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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

June Term, 1861, January and June Terms, 1862, and January
Term, 1863.

BY JOHN W. SHEPHERD,
STATE REPORTER.

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VOL. XXXVIII.

MONTGOMERY, ALA :
BARRETT & BROWN'S BOOK AND JOB OFFICE.
1867.

REPORT

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SUPREME COURT OF ALABAMA

June Term 1881, January and May Terms 1882 and January Term 1883

BY JOHN W. HENNING

CLERK OF THE COURT

VOL. XXXIII

WILLIAMSON, JAMES
BAGGELL & BROWN'S BOOK AND JOB OFFICE
1881

OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HON. A. J. WALKER, CHIEF JUSTICE.

HON. G. W. STONE, }
HON. R. W. WALKER, } ASSOCIATE JUSTICES.

M. A. BALDWIN, ATTORNEY-GENERAL.

JOHN D. PHELAN, CLERK.

WARREN D. BROWN, MARSHAL.

OFFICERS OF THE SUPREME COURT

During the term of their offices.

Hon. A. J. Walker, Chief Justice.

Hon. G. W. Stone,

Hon. E. W. Walker, } Associate Justices.

M. A. Baldwin, Attorney-General.

John D. Furbush, Clerk.

Warren D. Brown, Marshal.

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RULES OF PRACTICE IN SUPREME COURT.

RULE 33. *Failure to file transcript.*—When an appeal has been taken, or shall be hereafter taken, to this court, from any chancery, circuit, or probate court, or from the city court of Mobile, and the term of this court to which such appeal is taken shall close its session, or cease to hear arguments; if the record in such cause shall not have been filed, and no order made in this court, either continuing said cause, or disposing of the same, it shall be the duty of the clerk of this court, at the request of any attorney thereof, to certify such failure to file the record, or have such order made in the cause, to the register, clerk, or probate judge of the court from which it is represented that said appeal has been prosecuted; and the certificate made pursuant to this rule shall be a full authority to the register, clerk, or probate judge, to proceed in said cause as if no appeal had been prosecuted.—Adopted June term, 1860.

RULE 34. *Order of business on Thursday; injunction cases.*—On Thursday, immediately after the motions and state cases are disposed of, the cases of appeal from orders dissolving injunctions belonging to the division, and not previously disposed of, shall be called, and stand for trial, as preferred causes, in the order in which they stand on the docket.—Adopted June term, 1860.

RULE 35. *Same.*—On each Thursday of the time allotted to the several divisions, after the motions shall have been heard, the criminal cases belonging to the division shall be called, and shall be in order until all are disposed of, unless continued or postponed by the court; and after the criminal cases have been disposed of appeals, from orders

dissolving injunctions, belonging to the division, and not previously disposed of, shall be called, and stand for trial, as preferred causes, in the order in which they stand on the docket.—Adopted January term, 1866.

RULE 36. *Papers on file not taken from the capitol.*—No transcript, or other papers (except briefs,) after being filed in this court, or being submitted to the court, shall be delivered to the bar, except for use and examination within the capitol; and all members of the bar are positively forbidden to take any such record or paper from the capitol.—Adopted January term, 1866.

RULE 37. *Application for bail, mandamus, &c.; transcripts as in other cases.*—All applications to this court to admit to bail, or for the writ of *habeas corpus*, *mandamus*, or other writ or process depending on motion in this court, together with all proceedings and papers touching the same, shall be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be in suitable form for binding; and no application shall be heard that is not so presented.—Adopted January term, 1866.

RULES OF CHANCERY PRACTICE.

RULE 20. *Service of process on infants.*—Summons to answer bills, issuing against infants, may be served on their parents, or either of them, if in life ; or, in case they are dead, upon the general guardian of such infant ; *provided*, such parent or guardian has not an interest adverse to such infant. When there is no parent, or guardian, or their interest is adverse to the infant, if the infant is over fourteen years of age, then the service shall be upon such infant personally ; and if the infant is under the age of fourteen, then the summons must be served upon such person as may have the maintenance or charge of such infant, unless opposed in interest. And should there be any case not provided for by statute, or by this or some other rule, and proof be made before the chancellor or register, he may direct the mode of service, or appoint a guardian *ad litem* for such infant without service.—Adopted January term, 1866.

THE HISTORY OF THE

REIGN OF
HENRY THE FIRST
BY
JOHN GILBERT FROTHINGHAM
OF
NEW ENGLAND
IN TWO VOLUMES
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REPORTS OF CASES ARGUED AND DETERMINED

AT JUNE TERM, 1861.

LEWIS *vs.* ELROD.

[BILL IN EQUITY TO PROTECT REMAINDER IN SLAVES.]

1. *Separate estate of wife; how created by deed.*—In a deed of gift to an unmarried woman, a provision declaring that, “should she hereafter marry, the said property is not to be subject to the debts of her husband,” does not create a separate estate in the donee.
2. *Parties to bill to protect wife's separate estate.*—A bill to establish and protect a married woman's statutory separate estate in slaves, in which she claims a remainder, is properly filed in her name, by her next friend; and her husband is properly made a defendant, though he is a mere formal party, where the controversy is between the wife and one who claims the absolute property in hostility to her; but a vendor of the persons from whom the defendant purchased, who conveyed without warranty of title, is neither a necessary, nor a proper party to the bill.
3. *Where bill may be filed.*—When a bill is filed in a chancery district in which no “material defendant resides,” (Code, § 2875,) and the defect appears on the face of the bill, it is demurrable; a “material defendant,” within the meaning of the statute, being one who is really interested in the suit, and against whom a decree is sought.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Louisiana V. Lewis, suing by her next friend, against her husband, Otis F. Lewis, together with George Elrod, Gray Beavers, J. T. Bradford, J. T. Morgan, S. F. Rice, and Mrs. Eleanor Wright. Its object was to establish and protect, by injunction, writ of seizure, and other appropriate process, the complainant's interest in certain slaves, in which she claimed a separate estate in remainder, under a deed of gift from W. M. Moore and Eleanor, his wife, (now Mrs. Eleanor Wright.) of which the following is a copy:

"Know all men by these presents, that we, William M. Moore and Eleanor S. Moore, his wife, both of the State of Alabama and county of Shelby, being impressed with the uncertainty, and being desirous of making some provision for the better maintenance, education, and future support of Louisiana Virginia Baily, daughter of Edmund J. Baily, deceased, have this day, in consideration of the love and affection we bear to the said Louisiana Virginia, and for the further consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, given and granted to the said Louisiana Virginia, and, by these presents, do give and grant unto her the following slaves," (specifying them,) "together with all the future increase of said negroes; to her during her life-time, and to descend to her heirs; with this express condition, that, should she hereafter marry, the property is in that event not to be subject to the debts of her husband; but should she die without issue, then the property is to revert back to her brothers and sisters; with this further condition, that the slaves herein conveyed are to belong to us during our life-time, and to be in no sense subject to the control of the said Louisiana Virginia Baily until after our decease; but after that, we wish the conveyance herein made to be in force and effect. In testimony whereof," &c.

The bill alleged, that, at the time this deed was executed, the slaves mentioned in it belonged to the said William M. Moore; that in 1850, after the death of said Moore, his widow intermarried with one Samuel Wright; that in Jan-

Lewis v. Elrod.

uary, or February, 1851, Wright and wife sold and conveyed the slaves to the defendants Bradford, Rice, Morgan and Beavers, who afterwards sold and conveyed to the defendant Elrod; that each of these conveyances purported to transfer the entire and absolute interest in the slaves; that the complainant married Otis F. Lewis in December, 1855; that said Otis F. Lewis and Mrs. Eleanor Wright resided in Wilcox county, and that the other defendants resided in other counties in the State. The bill prayed, that an injunction, writ of seizure, or other proper process, might be issued against the defendant Elrod, to restrain him from removing the property out of the State; that the complainant's separate estate in remainder in the slaves might be declared and established by the decree of the court; that Elrod might be required to give bond, with good sureties, conditioned for the forthcoming of the slaves on the determination of the preceding life-estate; and for other and further relief.

The defendants demurred to the bill, for want of equity, because it was filed in the wrong county, and on several other grounds. The chancellor sustained the demurrer, and dismissed the bill, but without prejudice to the complainant's rights, at the costs of her next friend; and his decree is now assigned as error.

ALEX. & JOHN WHITE, for appellant.

D. W. BAINE, *contra*.

A. J. WALKER, C. J.—The deed of gift by Moore and wife did not create a separate estate in the complainant. The clause of the deed which declares that the property shall not be subject to the husband's debts, does not have the effect of creating a separate estate.—*Gillespie v. Burleson*, 28 Ala. 551; *Bender v. Reynolds*, 12 Ala. 446. But our first married-woman's law was passed on the first of March, 1848.—Pamphlet Acts of 1847–8, p. 79. The deed is dated in 1849. The complainant married on the 20th December, 1855. There can be no question, that

whatever right the complainant may have by virtue of the deed, is her separate estate under the law. This being the case, the bill is appropriately filed by the wife, through her *prochein amy*; and the husband is, with equal propriety, made a defendant.—1 Dan. Ch. Pl. & Pr. 143; *Michan v. Wyatt*, 21 Ala. 813; *Gerald and Wife v. McKenzie*, 27 Ala. 166.

As the bill is filed to protect the wife's separate statutory interest in personal property, the husband is a mere formal party. It is true that, if he should live until the possession of the property is obtained, he may be entitled to receive the income as the wife's trustee, without liability to account for the same. But that prospective right of his is not in litigation in the case. The controversy is between the wife, claiming a separate estate in remainder, and a defendant who claims the absolute title in hostility to her.

Another defendant is Mrs. Wright. She joined with her husband in a conveyance of the slaves to four persons, who conveyed to the defendant Elrod. The conveyance in which Mrs. Wright joined is not alleged to have contained any warranty of title; but we may infer that it did not contain such warranty, for, in passing upon a demurrer to a bill, we can not aid the bill by supplying averments. The only connection which Mrs. Wright has with the case, is that she is the transferrer, without warranty, to the vendors of the person who now holds the property. Whatever interest she may have ever had in the property, was all gone. She had no right or claim of any kind which could be, either directly or indirectly, affected by this suit. She was neither a necessary, nor a proper party defendant. *Mims v. Mims*, 35 Ala. 23; *Gunn v. Brantley*, 21 Ala. 633; *Haley v. Bennett*, 5 Porter, 452; *Batre v. Auze*, 5 Ala. 173.

[3.] The two defendants to whom we have alluded, are the only ones who are residents of the chancery district in which the bill was filed; and the other parties who have an interest in the suit reside in other counties of this State. The Code requires, that in such a case the bill should "be

filed in the district in which the defendants, or a *material* defendant, resides.”—Code, § 2875. The signification of the word “*material*” is important. The object of the statute was to prevent, as far as possible, the imposition upon those charged with the defense of chancery suits, of the burden and inconvenience of litigating in counties remote from their residences. Hence, it was necessary to discriminate between those defendants whose attitude in reference to the case does not make them real participants in the litigation, and those who occupy in reference to the suit the opposite character. The word *material* has been employed to describe parties of the latter class; and it is, perhaps, as apt an expression for the purpose as could have been found. The material defendant is one who is really interested in the suit, and against whom a decree is sought. Neither of the defendants resident in Wilcox county was a material defendant, and for that reason the demurrer was rightfully sustained; and the chancellor’s decree is, therefore, affirmed, without passing upon any other of the assignments of demurrer.

RAGSDALE AND WIFE *vs.* NORWOOD.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Remainder by parol gift.*—In this State, a remainder in personal property cannot be created by parol gift.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by James P. Ragsdale and Mary F. Ragsdale, his wife, against Andrew Norwood, to recover damages for the conversion of a slave named Rebecca; and was commenced on the 12th September, 1859.

Ragsdale and Wife v. Norwood.

The plaintiffs claimed title to the slave under a verbal gift in remainder to Mrs. Ragsdale from Eleanor S. Lewis, who was her great aunt; while the defendant held under a purchase from Isaac L. Jordan, who was the father of Mrs. Ragsdale. "The plaintiffs' evidence tended to show," as the bill of exceptions states, "that said Eleanor S. Lewis owned a negro woman named Anaka, and in July or August, 1838, made a verbal gift of said slave, the terms of which were, that she gave the slave to Nancy Jordan, wife of Henry Jordan, for her life, and at her death, said slave, with her increase, was to be the property of the children of Isaac L. Jordan; and that the donor executed the gift, by delivering the said slave to the said Nancy Jordan, who remained in possession of said slave until her death in 1841. The slave in controversy was a child of said Anaka, and was born after the said gift and delivery of said Anaka to the said donee. On the death of the said Nancy Jordan, the slave in controversy went into the possession of Isaac L. Jordan, and was held by him, for his children, until 1852; but the proof in reference to his possession, and as to the manner in which he held said slave, was conflicting and contradictory. It was further proved, that Mrs. Mary Ragsdale was the only child of the said Isaac L. Jordan at the time of the said gift and delivery of the woman Anaka to Mrs. Nancy Jordan; but there was no other evidence in regard to the gift and delivery of said slave." On this evidence, the court instructed the jury, in effect, that the remainder to the children of Isaac L. Jordan, attempted to be created by said verbal gift, was inoperative and void. The plaintiffs excepted to this charge, and they now assign it as error.

S. W. COCKRELL, for appellants.—A remainder in personal property may, in this State, be created by deed or will; and no good reason can be perceived why it may not also be created by parol. The delivery to the tenant for life, would operate as a delivery to the remainder-man; and any objection that can be urged against the validity of

such remainder, would be equally applicable to all parol gifts. As to the validity of a parol remainder to a person who is in being when the gift is made, see 2 Kelly, (Geo.) 297; 2 Hill, (S. C.) 543. An analogous principle is well settled in this State, which allows a separate estate in a married woman to be created by parol.—*Blocker's Adm'r v. Jennings*, 25 Ala. 515; *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

F. P. SNEDICOR, *contra*.—At common law, a remainder in a chattel could not be created even by deed.—2 Hayw. (N. C.) 130, 182; 2 Bla. Com. 398. Public policy requires, that when the possession of personal property is separated from the title, there should be some open manifestation of the fact by which third persons might be notified of the true state of facts. The statutes of this State, which were in force when the pretended gift in this case was made, required that it should be in writing, and duly recorded.—Clay's Digest, 255; 2 Ala. 648; 12 Ala. 612; 2 Kent, 352. In Kentucky, under a similar statute, it has been held, that a writing and record are necessary to perfect a remainder.—5 Dana, 306; 9 Dana, 352; 2 Bibb, 102; 1 Dana, 237. In Georgia and Virginia, a parol remainder in slaves, to take effect after the death of the first taker, is void.—*Kirkpatrick v. Davidson*, 2 Kelly, 297; *Maxwell v. Harrison*, 8 Geo. 61; *Fitzhugh v. Anderson*, 2 Hen. & Mun. 302. To allow the creation of such estates by parol would open a wide door for frauds and perjuries. An additional objection is, that there can be no valid delivery of such remainder.

STONE, J.—It was evidently the ancient law, that a remainder in things personal could not be created even by deed. As part of the reason for this, it was said, that personal property could not, in any correct sense, "be held for any estate," but was the subject of absolute ownership.—See 2 Black. Com. 398; Williams on Personal Property, 7, 199, 200, and note; Sugden on Property, 64 Law Library, 355-6.

So in America, some of the States have held, that no remainder in chattels can be created by deed.—See *Cutler v. Spiller*, 2 Hayw. 130 ; *Gilbert v. Murdock*, *ib.* 182 ; *Vass v. Hicks*, 3 Murph. 494 ; *Sutton v. Hollowell*, 2 Dev. Law, 185 ; *Morrow v. Williams*, 3 Dev. Law, 264 ; *Betty v. Moore*, 1 Dana, 236.

This stern rule has yielded to exceptions in England, and has been generally repudiated on this side of the Atlantic. In this State, it was early settled, and has been steadfastly maintained, that a remainder in things personal can be created by deed.—*Catterlin v. Hardy*, 10 Ala. 511 ; *Shep. Digest*, 536.

The rule we have declared in reference to the perfection of oral gifts is, that the thing must pass from under the power and dominion of one person, into the possession, control and dominion of another, who must be either the donee, or some person who receives the dominion and control for the donee.—*Smith v. Wiggins*, 3 Stew. 221 ; *Sims v. Sims*, 8 Porter, 451 ; *McCutchen v. McCutchen*, 9 Porter, 656 ; *Pope v. Randolph*, 13 Ala. 221 ; *Easley v. Dye*, 14 Ala. 166-7 ; *Thomas v. DeGraffenreid*, 17 Ala. 610 ; *Stallings v. Finch*, 25 Ala. 518 ; *Ivey v. Owen*, 28 Ala. 647. Under this principle, it is contended, that the gift of the remainder in this case is not perfected, because no person has received the dominion and control of the slaves in controversy, for the benefit of those who claim in remainder. Probably this argument is answered by the analogy to that principle, well settled in this court, which asserts that, when a legacy is to one for life, with remainder to another, the possession of the life-tenant is the possession of the remainder-man ; and the assent of the executor to the bequest to the first taker, is an assent to the gift in remainder. *Magee v. Toland*, 8 Por. 36 ; *Pitts v. Curtis*, 4 Ala. 350 ; *Brown v. King*, 10 Ala. 819 ; *Chambers v. Perry*, 17 Ala. 726 ; *Gibson v. Land*, 27 Ala. 117 ; *Walker v. Fenner*, 28 Ala. 367 ; *Thrasher v. Ingram*, 32 Ala. 645, 668 ; 1 *Roper on Legacies*, 570 ; *Cains v. Marley*, 2 Yerger, 584.

Although the rigor of the ancient common law, in rela-

tion to the creation of remainders in things personal, has yielded much to the spirit of progress observable in our modern jurisprudence; yet we have never held, that such remainder can be created by oral gift; and, although what is called a sealed instrument has, for many purposes, ceased to be, with us, distinguishable from unsealed writings, save by the employment of a rather unmeaning scroll, still we have refused to recognize the validity of a gift of personalty not perfected by delivery, even though the attempted gift be evidenced by writing, unless it be also *under the seal of the donor*.—*Connor v. Trawick's Adm'r*, 37 Ala. 289.

In the case of *Kirkpatrick v. Davidson*, (2 Kelly, 302,) the supreme court of Georgia said: "The common law has never gone further than to extend the right to create remainders over in personal estate *by writing*; such were its provisions at the beginning of the revolution, when adopted by this State. The inquiry, then, very naturally presents itself, by what authority can courts take it upon themselves to dispense with *this writing*? It is not pretended that there is any statute still further extending the common law; and, in the absence of such legislation, where the common law stops, we must stop. And public policy stands decidedly opposed to a wider departure from the ancient doctrine of the law as to these limitations. If even when evidenced by *grant or will*, they are justly obnoxious to the eloquent strictures of Judge Tucker, what shall we say of them when resting in parol? Slaves, and other personal property, in the possession of one person, with remainder over to some half-dozen others in succession, to any number of lives in being and twenty-one years and the period of gestation after—what inextricable confusion! what a rich harvest of perjury!" See, also, *Maxwell v. Harrison*, 8 Georgia, 61; *Fitzhugh v. Anderson*, 2 Hen. & Munf. 289; *Keyes on Chattels*, § 407; *Payne v. Lassiter*, 10 Yerger, 507.

So, we think that, to allow the creation of a remainder in things personal by oral gift, would open a wide door for

injustice, fraud, and even for perjury on the part of witnesses. We follow the precedent set us by the supreme court of Georgia, and hold that the remainder attempted to be set up in this case is inoperative and void.

We are not unmindful of the fact, that this court has given effect to separate estates of married women in personal property, created without writing.—See *Crabb v. Thomas*, 25 Ala. 212; *Lockhart v. Cameron*, 29 Ala. 355. And we confess that it is somewhat difficult to distinguish in principle between the two classes of cases. Possibly it would shut the door against fraud, if the rule were so changed as to prevent the creation of separate estates without writing. This, however, is a question we are not inclined to consider open in this court.

Without intending to disturb the principle above announced, we are unwilling to enlarge the rule, so as to bring within its influence a class of cases much more numerous, and from which there would probably be reaped a much more abundant harvest of frauds and perjuries.

The judgment of the circuit court is affirmed.

GREGORY vs. WALKER.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Proof of delivery of deed.*—The testimony of the subscribing witness to a deed, to the effect that, immediately after its execution, the grantor handed it to the mother of the grantees, who were infants living with their mother, “and told her to keep it,” is, at least, sufficient to let the deed go to the jury; the intention of the grantor, that it should or should not be considered as delivered, being a question for the determination of the jury, under proper instructions from the court.
2. *Whether instrument is deed or will.*—An instrument of writing, in form a deed, which purports to be made in consideration of the ‘regard’ entertained by the grantor for the grantees, and for the further consideration of one dollar in hand paid, and which conveys to the grantees, by the words of conveyance usually employed in deeds,

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- certain real and personal property, 'together with the right to control the same at the death' of the grantor,—is a deed, and not a will.
3. *Evidence of fraud in execution, or illegality of consideration of deed.* Plaintiffs claiming title to the land in controversy under a deed of gift from defendant's deceased father, which defendant sought to impeach on the grounds of non-delivery, fraud in the execution, and illegality of consideration; a written agreement between said grantor and plaintiffs' mother, an unmarried woman, which was executed several months before the deed, did not refer to the property conveyed by the deed, was not referred to in the deed, and simply stipulated for the performance by plaintiffs' mother of domestic services for said grantor during his life, in consideration of which he promised to give her certain personal property at his death, and to provide board until that time for her and her said children,—is, *prima facie*, irrelevant; nor is it admissible in connection with parol evidence, which is offered "for the purpose of showing that said deed was fraudulently obtained," but which does not tend to show fraud in its execution.
 4. *Redundant evidence.*—The exclusion of evidence which is offered to prove a fact that has been already proved, and is not denied or controverted by the opposite party, is, at most, error without injury.
 5. *Declarations of grantor; when admissible against grantee.*—The declarations of the grantor, tending to impeach the validity of his deed, are not admissible evidence against the grantee, unless shown to have been made before the execution of the deed.
 6. *To what witness may testify.*—A witness can not testify that a person "was deranged, or insane"; nor that "her insanity became worse because of the conduct" of her husband and another woman; nor that a man and a woman "lived in adultery" with each other: such statements are mere conclusions, or deductions from facts, and not the facts themselves.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by John Walker and Minerva J. Walker, (infants, suing by their next friend, Mary Walker,) against Terrell Gregory, to recover the possession of a certain tract of land, containing one hundred and sixty acres, together with damages for its detention; and was commenced on the 16th August, 1853. The defendant pleaded the general issue, "in short by consent, with leave to give in evidence anything that might be specially pleaded in bar; and the plaintiffs replied in like manner, and with like leave." The land in controversy belonged to Jeremiah Gregory, deceased, in his life-time; and the plaintiffs derived title to it under an instrument, of which the following is a copy:

the house in which he (witness) lived. Between eleven and twelve o'clock on the morning of that day, said Gregory rode up to his house. Polly Walker, with the plaintiffs, her children, had come to his house the evening before, and staid all night, and were there when old man Gregory came. When witness saw him ride up, he had not the slightest idea of his object in coming; but he dismissed his school, and went over to the house, and he and the old man took a seat on the piazza. After a few minutes' chat, in which the old man said nothing about his intention to execute this deed, or his object in coming there, he rose up, and told witness he wanted him to do a little business for him privately, and proposed to walk over to the school-house. Witness assented, and they started to go; the old man called to Polly Walker, who was in the house, to 'come on', and they went over to the school-room. When they were inside, the old man pulled a paper out of his pocket, and requested witness to fill it up as he directed; and witness accordingly inserted in their proper places, as they appear in said deed, the plaintiffs' names, the property conveyed, and the other words which are" italicised in the above copy of the deed; "and wrote the old man's name, at his request, at the bottom, and signed his own name as an attesting witness thereto. Before the old man made his mark to it, he not being able to read writing, witness read the paper over to him correctly; and when he came to the description of the land, the old man told him he had made a mistake in the numbers; and witness then proceeded to correct the error, as shown in the deed. These alterations and interlineations were made by the old man's directions, before he made his mark to it. After the deed was corrected and signed, the old man handed it to Polly Walker, and told her to keep it; and at the same time he handed her another paper, signed by him and Polly Walker in April, 1849, and attested by witness and Mr. Barker, and said to her, 'Some one must keep that.' This was all that was said by the old man when he delivered said deed. They

then returned towards the house, and the old man went off home,—would not even stay to dinner; and after dinner Polly Walker, with the plaintiffs, also started towards home, their home being at said Gregory's house." On this evidence, the plaintiffs proposed to read the deed to the jury. The defendant objected to its admission, "on the ground that it had not been proved to have been delivered, and also because it was a testamentary paper, and not a deed." The court overruled the objections, and allowed the deed to be read to the jury; and the defendant excepted.

The witness Lawson testified, on cross-examination, that he was the son-in-law of Polly Walker, having married one of her daughters; that said Polly Walker, at the time of the delivery of said deed, had four children living, though she had never been married; that two of these children were born before she went to Gregory's house to live; that Gregory was between sixty-five and seventy years of age at the time of the execution of said deed, but was very strong and vigorous in mind and body, and his wife (defendant's mother) was then between sixty and seventy years old; that the younger of the plaintiffs was at that time between ten and twelve, and the older between twelve and fourteen years old. "It was further proved by defendant, on cross-examination of said Lawson, and without objection on the part of the plaintiffs, that Polly Walker, with her father, went to live on said Gregory's plantation before plaintiffs were born, and continued to live there until February, 1849, when she went to live in his house, and carried the plaintiffs with her, and continued to live in his house, and in his employment, from that time until his death in 1853; none of which was denied or controverted by plaintiffs." In reference to the written agreement between said Gregory and Polly Walker, above referred to as being attested by Lawson and one Barker, Lawson testified, on cross-examination, that he wrote the name *Rachel* where it occurs in said agreement, at the request of Gregory, some time between the 24th April and the 10th August, 1849, and signed his name thereto as an

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attesting witness; and Barker, the other subscribing witness, testified, that the name *Rachel* was not in the agreement when it was executed by the parties, in his presence, on the day of its date. The agreement referred to, which the parties executed by making their respective marks across their names as written by the attesting witnesses, was in the following words:

“Agreement made and entered into the 24th day of April, A. D. 1849; between Jeremiah Gregory and Mary Walker, both of the county of St. Clair and State of Alabama, witnesseth, that said Gregory agrees with said Mary Walker to give her at his decease one negro slave *at his decease*, together with the future increase from this date *date*, and twenty head of hogs, one horse, saddle and bridle, for and in consideration of her services during his life, in attending to the business of his house, working in the house, and attending and keeping in repair the clothing of the family, furniture, and beds; also, to find board for her and her two children during the same period; and on failing to comply with said stipulation, this agreement to be null and void. And the said Mary Walker hereby agrees to attend to the household business of said Gregory during his *live*, (should she live so long,) and use due care, industry and diligence in keeping the household furniture and apparel in order and repair, and to accept for her services, at the decease of said Gregory, said female slave Rachel and her increase, and board and sustenance for herself and her two children, and twenty head of hogs, and one horse, saddle and bridle. In testimony whereof,” &c.

The defendant offered to read this agreement to the jury, on proof of its execution; but the plaintiffs objected to its admission, on the ground that it was irrelevant, and the court sustained their objection; to which the defendant excepted.” “The defendant then offered said agreement in evidence, in connection with the other evidence hereinbefore set out, as tending to show that the pretended deed to the plaintiffs was fraudulently obtained by said Polly Walker and Lawson, and as tending to show that, on said

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10th day of August, 1849, said Polly Walker was in the hired employ of said Gregory ; and insisted, that, if such was the fact, it was evidence to which the jury might look, in determining whether plaintiffs' said deed was ever delivered,—there being no other evidence of a delivery than the testimony of said Lawson, hereinbefore set out." The court refused, on plaintiffs' motion, to allow said deed to be read for either of the purposes specified ; and the defendant excepted.

The deposition of Dr. Wm. H. Benson was taken, on interrogatories and cross-interrogatories, in another suit between Mary Walker and the defendant, under an agreement that it might also be used, so far as it was legal evidence, in this suit ; and the defendant offered in evidence the answers of said witness to the cross-interrogatories. On motion of the plaintiffs, the court excluded from the jury the following portion of the answer of said witness to the second cross-interrogatory : " The wife of Jeremiah Gregory was living with him when Mary Walker went to live with him. She was deranged, or insane. Her insanity was worse after Mary Walker went there to live. It was because of the conduct of her husband and Mary Walker. *Said Mary Walker lived in adultery with Jeremiah Gregory. Witness knew of said Gregory's having illicit intercourse with Mary Walker frequently during her stay there ; knew said Gregory to sleep with her often ; has frequently seen them engaged in the very act of illicit intercourse. Said Gregory kept up illicit intercourse with Mary Walker, from the time witness first knew her, until said Gregory's death.*" The defendant reserved an exception to the suppression of this part of the witness' answer, and then offered separately the italicized portion of the answer, " as evidence tending to show that the real purpose and consideration of the pretended deed from Jeremiah Gregory to plaintiffs was future illicit intercourse between said Gregory and Mary Walker." The court refused to allow it to be read for that purpose, and the defendant excepted. The court also excluded from the jury the following portion of the

answer of this witness to the third cross-interrogatory: "Said Gregory told witness, that he had brought Mary Walker to his house, and had pretended to hire her, for a blind to keep down the suspicions of his neighbors, to avoid the law against living in adultery"; to which the defendant also reserved an exception.

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

HEFLIN, MARTIN & FORNEY, for appellant.

GOLDTHWAITE, RICE & SEMPLE, ALEX. & JNO. WHITE, and B. T. POPE, *contra*.

R. W. WALKER, J.—1. There was no error in allowing the deed from Gregory to the plaintiffs to be read in evidence. The evidence in relation to its execution and delivery was, at least, sufficient to let the instrument go to the jury. Whether there was in fact a valid delivery, depended on the intention of the grantor that the deed should or should not be considered as executed; and of that intention the jury were to judge, under the charge of the court.—*McLure v. Colclough*, 17 Ala. 96; *Morris v. Varner*, 32 Ala. 499.

[2.] There is nothing in the second objection made to the introduction of the deed in evidence: It is clearly a deed, not a will.

[3.] The written agreement between Gregory and Mary Walker does not appear, upon its face, to have any connection with the subject-matter of this suit, nor with the deed from Gregory to the plaintiffs. It was made between different parties, for a different purpose, upon a different consideration, and at a different time. Considered by itself, therefore, it was obviously irrelevant. Nor was it admissible, when offered in connection with the other evidence referred to in the bill of exceptions, for the purpose of showing that the deed to the plaintiffs was fraudulently obtained. We are unable to perceive that this agreement, either by itself, or in connection with the other evidence

alluded to, could have tended in the least to prove fraud in the execution of the deed under which the plaintiffs claimed title. And it was well settled that, at law, and as between parties occupying the relation that the present parties sustain to each other, no kind of fraud can be shown, except fraud in the execution of the deed,—such as, that it was falsely read to the grantor, or the like.—*Thompson v. Drake*, 32 Ala. 99; *Morris v. Harvey*, 4 Ala. 300.

[4.] It had already been proved, (and the fact was not denied or controverted by the plaintiffs,) that Polly Walker was living at Gregory's house, and in his employment, on the 10th of August, 1849. This being so, the exclusion of the agreement between Gregory and Mrs. Walker, when offered for the purpose of proving the same fact, was not a reversible error. The exclusion of unnecessary or redundant evidence, is error without injury.

[5.] The declarations of Gregory, the grantor, were properly excluded; for the reason, that they were not shown to have been made before the execution of the deed to the plaintiffs. A gift cannot be affected by declarations of the donor, made after the gift was consummated.—*Olds v. Powell*, 7 Ala. 652; *Mobley v. Barnes*, 26 Ala. 718.

[6.] Some portions of each of the other answers of Benson, which were excluded by the court, were clearly irrelevant, or illegal. For example, the statements, that the old lady (Mrs. Gregory) "was deranged"; "that her insanity became worse because of the conduct of her husband and Mary Walker"; "that Polly Walker lived in adultery with old man Gregory,"—were mere conclusions of the witness—deductions from facts, not the facts themselves. *Walker v. Walker*, 34 Ala. 473; *Donnell v. Jones*, 13 Ala. 519; *Benje v. Creagh*, 21 Ala. 156. There was, therefore, no error in excluding these answers; for, when evidence is offered, of which a portion is illegal, the court may reject all, and is not bound to separate the legal from the illegal.

Judgment affirmed.

A. J. WALKER, C. J., having been of counsel, not sitting.

CHANNEY'S HEIRS vs. CHANEY'S ADM'R.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Sale of decedent's lands, for equitable division; right of dower of heir's widow; jurisdiction of probate and chancery courts.*—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among his heirs, after the death of one of the heirs, the sale bars the right of dower of the widow of such deceased heir, but does not extinguish her right as dowress: the proceeds of sale stand in lieu of the land itself, and the portion of the deceased heir must be paid to his administrator, for the purposes of administration; but so much thereof as corresponds with her dower interest in the land, must be paid over to the widow, on her executing a suitable bond for the protection of those entitled to the reversion; and on her failure to give such bond, the money must be loaned out, and the interest be paid to her annually during her life; but the probate court is not competent to make and execute the proper decree in such case, and resort must therefore be had to the chancery court.

APPEAL from the Register in Chancery at Camden, on transfer from the Probate Court of Wilcox.

IN the matter of the final settlement and distribution of the estate of Emanuel B. Chaney, deceased, who was one of the children and heirs-at-law of Green B. Chaney, deceased, and of whose estate his widow (now Mary J. Nicholson) and Charles Nicholson were the administrators. It appeared on the settlement, that said Green B. Chaney died, intestate, in the early part of the year 1853; that in September, 1853, on the petition of his administrator, the probate court granted an order for the sale of his real estate, for the purpose of making an equitable division among his heirs; that the said Emanuel B. Chaney, one of the heirs, died in October, 1853, leaving a widow, but no children; that his widow administered on his estate, and afterwards married Charles Nicholson; and that the lands were afterwards sold under the said order of the probate court, and the proceeds of sale were distributed among the

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parties in interest,—Mr. and Mrs. Nicholson, as administrators of Emanuel's estate, receiving his share, which amounted to over \$6,000. As Mrs. Nicholson had never relinquished her dower interest, if any she had, as the widow of said Emanuel Chaney, in the lands belonging to Green B. Chaney's estate, the heirs and distributees insisted before the register, 1st, that her right of dower, if any ever existed, was not affected by the sale of the lands under the order of the probate court, and she was not entitled to any portion of the money received by her and her husband, as administrators, arising from the proceeds of said sale; and, 2d, that, if she was entitled to any portion at all, it was only for life. The register decided both of these points against the heirs, and rendered a decree, authorizing Nicholson and wife to retain, in right of Mrs. Nicholson, one-half of the money so received by them. The heirs and distributees reserved exceptions to the decision and decree of the register, and they now assign the same as error.

A. R. MANNING, for appellants.

J. L. SMITH, *contra*.

A. J. WALKER, C. J.—The administrator of the estate of Green B. Chaney, deceased, obtained an order for the sale of the land of the estate, for the purpose of equitable division among the heirs. Before the sale was made in pursuance of that order, Emanuel B. Chaney, one of the heirs, died, leaving a widow, but no descendants; and his estate was solvent. His share of the proceeds of the sale was paid over to the administrators of his estate. The court below ordered a distribution of the fund so received, among the distributees of Emanuel's estate, one of whom was the widow; her share being, under the statute of distributions, one-half.

At the time of Emanuel B. Chaney's death, he was seized of an undivided share of Green B. Chaney's real estate. Such seizin resulted from the descent to him from his ancestor. The lands of a decedent are made liable to

his debts by our law, and there are some statutory powers over them placed in the hands of the administrator. Subject to that liability, and to those powers, the land of an intestate descends to his heirs.—*Patton v. Crow*, 26 Ala. 426. The land of Green B. Chaney's estate was not needed for the payment of debts, and was not sold for that purpose. Emanuel B. Chaney was seized of the land as a coparcener, and his widow was entitled to dower.—*Park on Dower*, 41, 42. It is clearly the law, that the seizin of a coparcener is such that his widow is dowerable in the land held in coparcenary. The dower of the widow in the land itself must be, like the descent to the heir, subject to the power of sale, under an order of court, vested in the administrator; for, by statute, the administrator is required to convey all right, title, and interest, which the deceased had in the lands at the time of his death.—Code, §§ 1770, 1872. The statute prescribing the scope of an administrator's conveyance, forces us to the conclusion that the dower in the land is barred by the administrator's sale; for the title of the deceased at the time of his death was free from any claim of dower on the part of the heir's widow, and as the title existed in him at his death, so is it required to be conveyed by the administrator to the purchaser. Indeed, if the lands of decedents were sold for distribution, subject to the dower of the wives of the heirs, the effect upon those heirs whose shares were not incumbered by such claim, would be grossly unjust. Those whose shares were not so incumbered would be made to participate equally with the others in the loss resulting from the depreciation of price on account of the outstanding inchoate rights of dower. Therefore, justice and equality among the heirs, as well as the prescribed terms of the administrator's conveyance, require the conclusion, that the right of dower in the land, on the part of the wives of the heirs, is barred by the administrator's sale.

But we can not conclude that the interest of the dowress is destroyed by such a sale. It would not be destroyed if the heirs were to make a private sale, by mutual

consent, for division ; nor if a sale for the same purpose were made under a decree of the chancery court. We can not perceive how a sale, made for the benefit of the heirs, to accomplish the same purpose, in pursuance of the administrator's petition to the probate court, could have the effect of destroying the interest of the doweress. As the wife of an heir is deprived of her claim to a specific charge of her dower upon the land of the ancestor sold by the administrator for division, and as her interest survives the sale, she must, of necessity, be satisfied out of her husband's share of the proceeds of the sale.

It was decided in *Williamson v. Mason*, (23 Ala. 488,) that the money arising from a sale of land, would stand in place of the land, and would go, after the purposes of the administration were satisfied, to the heirs. So, also, we think that the proceeds of the sale of the land must stand to the widow in the place of the land, and she must take an interest in the money equivalent, as near as may be, to her interest in the land. This is very easily arranged, where, as in this case, the husband is dead. The husband having left no descendants, the widow would be entitled to the enjoyment for life of one-half of the husband's share of the proceeds of the sale of the land. Upon the rule settled in *Mason v. Pate's Executors*, (34 Ala. 379,) the widow should be permitted to receive the half of her deceased husband's share, upon her executing a suitable bond for the protection of those entitled in reversion ; and in case of her failure to give bond, the money must be loaned out, and the interest paid over annually to her during her life-time. To the making and execution of the proper decree, the powers of the probate court are, as is decided in the case just noticed, inadequate, and a resort must be had to the chancery court.

While the rule for the ascertainment and security of the widow's share is thus simple, when the husband is dead, we can very clearly perceive that much more difficult questions will be prevented for solution when the court is called upon to lay down a rule, which will secure to the wife of

a living husband-her contingent dower interest. We will not anticipate those questions now, but will leave them to be settled when they arise.

We think that Emanuel B. Chaney's share of the proceeds of the sale of the land of his deceased ancestor, Green B. Chaney, was legally paid over to the administrator of Emanuel's estate, and became assets, with which such administrator was chargeable in his representative capacity. At Emanuel's death, his undivided interest in the lands of Green B.'s estate became liable to his debts; and so the share of the money arising from the sale afterwards made, which stood in the place of the land, would be liable to the same debts. It must be, therefore, that such money was payable to the administrator of Emanuel's estate, and that the claim of the heirs for their respective shares of the fund is against the administrator in his representative capacity. The share of the fund produced by the sale of the land, must be divided between the widow and the heirs, in a manner corresponding with their respective interests in the land.

We do not think, that the fund produced by the sale of the land is to be regarded as subject to distribution as personality, because it has been stamped with that character by the decree against the administrator of Green B.'s estate, in favor of the administrator of Emanuel's estate. That decree simply directs the payment of the money arising from the sale, and determines nothing as to the light in which the money is to be regarded after passing into the hands of the administrator of Emanuel's estate. There is no ground upon which the parties interested can be held estopped by the decree above named from asserting rights in the fund corresponding with their interest in the land which was sold. There is no impracticability in distinguishing the fund arising from the sale of the land, and the argument based upon that supposition is untenable. The share of Emanuel in the land was, after satisfying the purposes of the administration of Green Chaney's estate, liable to the payment of the debts of Emanuel's estate.

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So the money, which was substituted for the land, would be assets for the payment of the debts of that estate. For that reason, it was necessary that the money should be deemed assets of Emanuel's administration, and should be receivable of him in his capacity of administrator, and recoverable from him in the same capacity.

Reversed and remanded.

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[PETITION FOR SALE OF SLAVES FOR PARTITION.]

1; *Jurisdiction of probate court to order sale.*—Where slaves are bequeathed by a testator to his daughter, "for the use of said daughter and her children," the probate court has no jurisdiction under the act approved February 5, 1856, (Session Acts, 1855-6, p. 20,) to order a sale of the slaves for partition, on the application of the guardian of the children.

APPEAL from the Probate Court of Macon.

IN the matter of the petition of Lewis T. Wimberly, as the guardian of the several minor children of Samuel T. Wimberly, deceased, for the sale of certain slaves, in which, as he alleged, his wards had a joint interest with their mother, Mrs. Henrietta A. Wimberly, under the will of her deceased father, Guilford Alford. The will of said Alford was executed in Georgia, where he resided at the time of his death, and was there duly admitted to probate after his death. The 3d and 7th clauses of said testator's will were in the following words: "*Item 3.* I give and bequeath unto my daughter, Henrietta A. Wimberly, my three negro boys, Bob, Washington, and Isaac, called 'young Isaac;' also, a woman named Lucy, and a girl named Florida; for the use of said daughter and her children, free from the disposition of her present or future husband. I also con-

firm unto my said daughter the gift of six negroes, Joe and his wife, Patience, and their four children, heretofore made." "Item 7. I direct that my executor, hereinafter named, shall dispose of the residue of my property, including the negroes not bequeathed, and all the real and personal property that I may be possessed of at my death, using his own discretion as to disposing of the negroes and land at public or private sale; and the balance of my property, after the settlement of my debts and necessary expenditures, and after carrying out the provisions contained in the preceding items, I direct shall be equally divided among my four children." Mrs. Wimberly contested the petition, and interposed a demurrer to it, on the ground that the court had no jurisdiction, on the facts therein stated, to order a sale for partition. The probate court overruled the demurrer, and, on the proof adduced by the guardian, granted an order of sale; to which rulings and decisions Mrs. Wimberly reserved exceptions, and she now assigns the same as error.

CHILTON & YANCEY, N. S. GRAHAM, and MAYES & ABERCROMBIE, for the appellant.

CLOPTON & LIGON, *contra*.

STONE, J.—We think the probate court erred in entertaining jurisdiction of the case made by the petition shown in this case. The third clause of Mr. Alford's will, construed in connection with the seventh, vested the title of the slaves in controversy in Mrs. Wimberly, and does not confer such estate upon her and her children as can be partitioned under the statute.—Acts of 1855–6, page 20. What estate the children have under the will, or whether after-born children, if such there be, will share in this bequest, we need not inquire, as the probate court has no jurisdiction of this trust estate.—See *McCroan v. Pope*, 17 Ala. 612; *Coleman v. Camp*, 36 Ala. 159; *Camp v. Coleman*, 36 Ala. 163; *Robertson & Pettibone v. Johnston*, 36 Ala. 197; *Walthall v. Wynne and Wife*, 37 Ala. 37; *Rugely &*

Harrison v. Robinson, 10 Ala. 702; *Nimmo v. Stewart*, 21 Ala. 682; *Hammond v. Nance*, 1 Swanst. 35; *Billingsley v. Harris*, 17 Ala. 214; *Gerald and Wife v. Bunkley*, *ib.* 170; *Shep. Dig.* 344.

-Reversed and remanded.

COX vs. BOYD.

[BILL IN EQUITY BY PURCHASER FOR SPECIFIC PERFORMANCE.]

1. *Offer to do equity.*—In a purchaser's bill for the specific performance of a contract of sale, the complainant must show that he has performed, or offered to perform, all the stipulations of the contract on his part; or he must show a sufficient excuse for his failure to do so, and aver his readiness and willingness to perform them.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

GEO. W. GUNN, with JNO. A. ELMORE, and W. P. CHILTON, for appellant.

GRAHAM, MAYS & ABERCROMBIE, *contra*.

MR. W. WALKER, J.—The case made by the bill is as follows: In December, 1853, T. W. Smith & Co. sold certain lands, on credit, to John R. Richardson, who gave his two notes for the purchase-money, and received from the vendors a bond to make titles upon the payment of the purchase-money. Richardson went into possession under this purchase, and paid one of the notes at its maturity. The other note, which was for \$1080, and due December 25, 1854, remained unpaid. After the maturity of this note, namely, on the 14th February, 1855, the complainant purchased the lands above mentioned, together with other lands, from Richardson, for \$4,800. A portion of the purchase-money was paid in cash, and the balance was arranged

by an obligation executed by the complainant, by which he bound himself to pay certain specified notes, one of them being the above-mentioned note for \$1080. Richardson gave the complainant a bond, conditioned to make title to all the lands included in the purchase when the several notes referred to were paid; and under this purchase complainant went into possession. Subsequently, and while the complainant was in possession of the land under his purchase from Richardson, T. W. Smith & Co. filed a bill against Richardson, to enforce their lien on the land for the payment of the note for \$1080, and obtained a decree, in pursuance of which the land was sold on the 30th March, 1857, to the defendant Boyd, for \$1370. On the same day, the complainant abandoned the possession. On the 30th March, 1859, the complainant tendered to both Boyd and Richardson \$1670, which, it is alleged, is more than the purchase-money paid by Boyd at the register's sale, with 10 per cent. *per annum* interest thereon, and all lawful charges and expenses, and demanded a conveyance of the title to said land, which each of them refused to make. Thereupon, the complainant files this bill, the object of which is to have the title to the land purchased by Boyd decreed to be conveyed to complainant.

The undertaking of Richardson was to convey to complainant upon the performance by the latter of the obligation executed by him. To decree the conveyance to complainant of the legal title to this land, before he has performed, or offered to perform, his obligation to Richardson, would be a violation of the maxim, that "he who seeks equity must do equity," which lies at the foundation of equity jurisprudence. This bill cannot be treated, therefore, otherwise than as a bill for the specific performance of Richardson's agreement to make titles to the complainant. Consequently, it should aver that the complainant has paid, or offered to pay, the notes specified in his obligation to Richardson; for the agreement of the latter was to make titles upon the payment of these notes. There is no averment that the complainant has paid, or offered to

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pay, the notes to Wesley C. Tarver and Robert Robinson, mentioned in the obligation and bond for titles; nor does complainant, by his bill, offer to pay these notes. Moreover, if the complainant had complied with his agreement with Richardson, made more than two years before the register's sale, to pay off the note for \$1080, that sale would not have taken place. As the complainant's bill shows that his own *laches* led to the sale of which he complains, and fails to show either a compliance with his agreement to pay the notes to Tarver and Robinson, or any excuse for his failure to pay them, it was without equity.—*Billingsley v. Billingsley*, 37 Ala. 425; *Bell v. Thompson*, 34 Ala. 636..

Decree affirmed.

RUSSELL vs. ERWIN'S ADM'R.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *What title will authorize recovery.*—In a real action in the nature of an ejectment, (Code §§ 2209–19,) a recovery may be had on proof of prior possession by plaintiff, under color of title, unless he is barred by the statute of limitations, or unless the defendant shows a better title. A possession under color of title, within the meaning of this principle, is necessarily held with claim of right; and the defendant would show a better title, by proving an outstanding valid title in a third person, or a prior possession by himself under color of title, which he had not abandoned, and which he was not estopped from asserting against the plaintiff.
2. *Abstract charge.*—An abstract charge, which asserts a correct legal proposition, is not a reversible error, unless the appellate court is reasonably convinced that it must have misled the jury.
3. *Estoppel against tenant from denying landlord's title.*—A tenant is estopped from denying his landlord's title, without first surrendering the possession under the tenancy; and the estoppel equally applies to his wife, living with him, and occupying simply as his wife under the tenancy, and to any third person who holds under him or his wife.
4. *What creates relation of landlord and tenant; estoppel en pais.*—If land is given, by parol, to an infant, and his mother enters into the possession, under an agreement with the grantor to hold it for the infant, the technical relation of landlord and tenant is not thereby created

between the infant and his mother; yet the mother is estopped from denying the infant's title, on the same principle which applies between landlord and tenant.

5. *Attornment to stranger; adverse possession.*—An attornment by a tenant to a stranger, who claims to own the land, although it may be ineffectual to create the relation of landlord and tenant between them, because of an estoppel against the tenant in favor of the landlord under whom he entered, nevertheless destroys the adverse character of his possession as against such claimant.
6. *Amendment of complaint.*—The complaint may be amended, (Code, § 2254,) after the evidence is closed, by correcting a misdescription of the land sued for.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by F. G. Kimball, as the administrator *de bonis non, cum testamento annexo*, of Isaac H. Erwin, deceased, against James W. Russell, Ellen Thompson, and Theodore Petit, to recover the possession of several city lots in Mobile, with damages for their detention. The defendant Russell was admitted by the court to defend as landlord, and pleaded the general issue, with a suggestion of adverse possession for more than three years, and the erection of valuable improvements. After the evidence was closed, the court allowed the plaintiff, against the objection of the defendant, to amend his complaint, by correcting a mistake in the description of the premises sued for; to which ruling the defendant reserved an exception.

The plaintiff claimed the premises under a deed of partition, executed by Jacob Baptiste and others, dated the 28th December, 1838, by which the lots, with others, were conveyed to his testator, Isaac H. Erwin, deceased; and he adduced evidence tending to prove that Erwin, by his tenants, had possession under the deed. The defendant Russell was the son of his co-defendant, Mrs. Ellen Thompson, by a former husband; and the plaintiff's evidence tended to show that Mrs. Thompson and her husband, Edward J. Thompson, accepted a lease of the premises, in 1849, from Mrs. Rebecca Erwin, the widow and adminis-

tratrix of said Isaac H. Erwin, deceased, and paid rent to her. The defendant read in evidence a deed for the premises from Wm. J. Morrison to himself, dated the 19th April, 1856; and adduced evidence showing that the title was in Morrison at the time said deed was executed. He also introduced one McBride as a witness, who testified to a parol gift of the land by said Morrison to him in 1838 or 1839, (he being then an infant;) that Morrison, at the time of said gift, put Mrs. Russell, defendant's mother, in possession of the land, and "told her to hold it for her son"; that Mrs. Russell agreed to do so, and continued in possession until some time during the year 1856, renting out a portion of the premises, erecting fences, &c. Numerous exceptions were reserved by the defendant to the rulings of the court on questions of evidence, but the decision of this court renders it unnecessary to notice them.

"The court charged the jury, among other things, that although the plaintiff had not connected his title with the United States, still, if they believed from the evidence that Erwin, and his legal representatives in his right, had been in possession of the land in controversy, prior to bringing this suit, under a deed, claiming title, and that it was so held by them for a number of years, or for any considerable time, then plaintiff could sustain the action without showing that his title was connected with the United States: that prior possession, under color of title, would authorize the plaintiff to recover, unless the defendant has shown a better title, or unless the plaintiff is barred by the statute of limitations; that if Thompson held possession of the land in controversy under the lease to him introduced in evidence, and if Mrs. Thompson was his wife, and lived with him whilst he so held possession, then, if, whilst the possession was so held by Thompson and his wife, the defendant Russell went into possession under either of them, he would be estopped, until he should surrender the possession, from setting up a title to the land, as against the landlord of Thompson, or the person standing in the place of such landlord; that although they might believe,

from the evidence, that the land in controversy was given by Morrison to the defendant in 1837 or 1838, before Erwin acquired the title or possession, and that Morrison put Ellen Russell in the possession of said land, claiming at the time to be the owner of it, and under an agreement with her to hold it for her son, and that she did take possession pursuant to said agreement, and that the defendant was at that time a minor,—this did not constitute the relation of landlord and tenant between the son and the mother, so as to make the son the landlord; and the mother his tenant; and that if she afterwards held possession under Erwin, or under Erwin's executor or administrator, such possession would be the possession of Erwin, or of his executor or administrator, as against both the mother and her son."

The defendant excepted to "each and every part of this charge," and then requested the court to instruct the jury, "1st; that if they believed, from the evidence, that Morrison put Ellen Russell (afterwards Thompson) in possession of the land, to hold for the defendant, her son, who was then an infant, and that she agreed to do so, and took possession under said request; then, by this contract, she became the tenant of her son; and that if she, while so holding, afterwards attorned to Erwin, or Erwin's administrator, or any one else, this, of itself, did not destroy or affect the defendant's possession." The court refused to give this charge, and the defendant excepted to its refusal.

The several rulings of the court to which exceptions were reserved, are now assigned as error.

W. BOYLES, with R. H. SMITH, for appellant.

JNO. T. TAYLOR, and JNO. HALL, *contra*.

A. J. WALKER, C. J.—The first proposition of the charge given by the court, of which the appellant complains, is, that prior possession, under color of title, would authorize the plaintiff to recover, unless the defendant had shown a better title, or unless the plaintiff was barred by the statute of limitations. It is unnecessary to

go at all into the general subject of possession as a ground of recovery in ejectment. It is sufficient in this case, that the authorities are such as to leave no room for doubt that the proposition stated by the court is correct; and we need not decide any thing as to the necessity of color of title to constitute prior possession a ground of recovery in this case.—*Smith v. Lorillard*, 10 Johns. 347; *McCall v. Pryor*, 17 Ala. 533; *Cox v. Davis*, *ib.* 744; *Badger v. Lyon*, 7 Ala. 564; *Heydenfeldt v. Mitchell*, 6 Ala. 17; *Smoot & Nicholson v. Lecatt*, 1 St. 590.

The appellant objects to the proposition of the charge, that it allowed a recovery by the plaintiff upon a possession not held under claim of title; and that it precluded a defense upon the ground of an outstanding valid title in a third person, or of an older possession than the plaintiffs. It is a sufficient answer to these objections, that the charge is not in fact obnoxious to them. It is not liable to the former objection, because it requires that plaintiff's possession should have been under color of title; and there could not be possession under color of title, unless the possession was held with claim of right. A possession under color of title is with a claim of right by virtue of the colorable title.—*Angell on Lim.* §§ 404, 405. The latter objection to the charge is obviated by its subordination of the plaintiff's right of recovery to the showing of a better title by the defendant. If the defendant had proved an outstanding valid title in a third person, or prior possession under claim of right in himself, which he had not abandoned without the *animus revertendi*, and which was unaffected by an estoppel, he would have shown a better title than the plaintiff's, and, under the charge, would have been entitled to the verdict. The charge would, as the appellant contends, have allowed a recovery by the plaintiff upon prior possession, notwithstanding the defendant's subsequent possession was under color of title; but in this there is no fault. The plaintiff's older possession, at least where, as in the case put by the charge, it was under color of title, must be preferred to a junior possession under color of title.

[2-3.] Another portion of the affirmative charge which is now pointed out as objectionable, is as follows: "If Thompson held possession of the land in controversy under the lease to him introduced in evidence, and if Mrs. Thompson was his wife, and lived with him whilst he so held possession, then, if whilst the possession was so held by Thompson and his wife, the defendant (Russell) went into possession under either of them, he would be estopped, until he should surrender the possession, from setting up a title as against the landlord of Thompson, or the person standing in the place of such landlord."

The first objection made to this portion of the charge is, that it is abstract. The bill of exceptions professes to set out all the evidence, except as to the value of rents and improvements. Upon looking carefully through the evidence, we can find no testimony tending to show that the defendant, Russell, ever held the land under either Thompson or his wife. It is, therefore, impossible to avoid the conclusion, that the charge is abstract. It is, however, a doctrine established in this court, that the abstractness of a charge, asserting a correct proposition of law, is not a reversible error, unless we are reasonably convinced that it must have misled the jury.—*Partridge v. Forsythe*, 29 Ala. 200; *Stein v. Ashby*, 30 Ala. 363; *Taylor v. Morrison*, 26 Ala. 728; *Johnson v. Boyles*, *ib.* 576; *Salmons v. Roundtree*, 24 *ib.* 458; *Towns v. Riddle*, 2 Ala. 694; *Hughes v. Parker*, 1 Porter, 139.

It is possibly true, that a husband might, in some conceivable case, be affected by an estoppel in favor of his landlord, which would not operate against his wife living with him; but this could never be the case, if the wife was in possession simply as a wife, living with her husband, who was the tenant. We understand the expression of the charge, "if whilst the possession was so held by Thompson and his wife," when construed in reference to the preceding part of the sentence, to mean, "if whilst the possession was held by Thompson as a tenant, and his wife as a wife living with her husband." Thus understood, it is

clear that the proposition of the charge is correct. The tenant, and his wife living with him, and possessing under the tenancy, and any person holding under either of them, would be estopped from denying the landlord's title, without a surrender of the possession under the tenancy.—*Pope v. Harkins*, 16 Ala. 321; *Shelton v. Eslava*, 6 Ala. 230; *Cook v. Cook*, 28 Ala. 660; *Doe v. Reynolds*, 27 Ala. 364; *Smith v. Mandy*, 18 Ala. 182; 1 Smith's Leading Cases, 657.

We are not reasonably convinced that the jury were misled by the charge, and we will not reverse because it is abstract. The counsel for the appellant argue as if the charge asserted that, upon its hypothesis, the defendant would be estopped from asserting his title in this case. The charge makes no such assertion. It says simply, that there would be an estoppel as to the landlord, or one standing in the place of such landlord.

[4.] The next objection is to that part of the charge which declares, that if a third person made a parol gift of the land to the defendant, then an infant, and his mother entered upon the land under an agreement with such third person to hold it for her son, the relation of landlord and tenant between the mother and son would not be created. The technical relation of landlord and tenant would not result from such an agreement.—Taylor's Landlord and Tenant, 9, § 14; Smith's Landlord and Tenant, 4. It was, therefore, not a reversible error, for the court to say that such a relation did not grow out of the facts stated. The court, however, went on to instruct the jury, that if the mother afterwards held possession under Erwin, it would be the possession of Erwin, both as to the mother and as to the defendant. Notwithstanding the technical relation of landlord and tenant would not grow out of the entry of the mother under the agreement to hold for her son, she would be estopped from denying the son's title. The mother, thus entering under the title of the son, and under an agreement to hold for the son, could not in violation of good faith, to the prejudice of her son, set up an antago-

nistic title; and she would be estopped, upon the same principle on which the tenant is estopped.—2 Smith's Leading Cases, top page, 611, marg. 458. The court erred, therefore, in charging that the possession of the mother, entering in such a manner, would be the possession of Erwin, because she held under Erwin. Certainly the possession of the mother could not be Erwin's possession as against the defendant. We think the court ought to have given the first charge asked by the counsel.

[5.] If Thompson and his wife attorned to Erwin, or to his representatives, the possession would not be adverse to them. Such an acknowledgment of the title, although it may have been ineffectual, in consequence of an estoppel in favor of the defendant, to create the relation of landlord and tenant, would take from the possession its adverse character. A possession can not be the basis of a bar under the statute of limitations, unless it is in fact adverse.

[6.] The court committed no error in allowing the amendments which were made.—Code, § 2254.

The questions of evidence presented in the bill of exceptions may not again arise in the same form, and we will not swell this opinion by noticing them; nor do we think it is necessary to notice the refusals to charge, further than we have already done.

Reversed and remanded.

SAUNDERS vs. CAVETT ET AL.

[BILL IN EQUITY FOR ATTACHMENT, INJUNCTION, &c.]

1. *Dissolution of injunction on answer.*—Where the answers deny all the charges and allegations of fraud, on which the prayer for an injunction is founded, the injunction is properly dissolved.
2. *Equitable attachment; affidavit that writ is not sued out to vex or harass.* When an equitable attachment is sued out by an accommodation endorser, on the ground that the principal debtor is fraudulently dis-

posing of his property, (Code, §§ 2954 *et seq.*; Session Acts 1855-6, p. 54,) the complainant must make affidavit, as in analogous cases at law, that the writ is not sued out for the purpose of vexing or harassing the defendant.

2. *Amendment of bill.*—Where the equity of a bill rests on a statutory equitable attachment, the failure of the complainant to make the necessary affidavit, denying an intention to vex or harass the defendant, is a substantial defect, which cannot be remedied by an amendment.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Green B. Saunders, against James B. Cavett and William L. Saunders, as partners composing the firm of Cavett & Saunders, together with W. M. Conner, W. McD. Conner, and others. Its object was to set aside, as fraudulent, a deed by which said Cavett & Saunders conveyed all their stock of goods, &c., to said W. M. Conner; and to have the goods &c. sold, and the proceeds of sale applied to the payment of certain bills of exchange, on which the complainant was, as he alleged, an accommodation drawer for the benefit of said Cavett & Saunders. The prayer was for an injunction, an attachment, the cancellation of the deed, the appointment of a receiver, an account, and general relief. An attachment and an injunction were granted by a circuit judge, on the execution of proper bonds by the complainant. A joint answer was filed by the two Conners, and a separate answer by Cavett; each denying all the allegations of fraud, and demurring to the bill for want of equity; and they also interposed a plea, on the ground that the bill was fatally defective for the want of an averment on oath that the attachment was not sued out for the purpose of vexing or harassing the defendants. After filing their answers, the defendants moved to dissolve the injunction; and the complainant asked leave to amend his bill, by adding, with other averments, an allegation that the attachment was not sued out for the purpose of vexing or harassing the defendants; the proposed amendments being duly sworn to. The chancellor dissolved the injunction, and refused to allow

the bill to be amended; and his decree is now assigned as error.

W. M. BROOKS, with whom were JOHN & CHAPMAN, for the appellant, cited *Calhoun v. Cozzens*, 3 Ala. 502; *Rives, Battle & Co. v. Walthall*, 34 Ala. 91; Session Acts 1857-8, p. 54.

E. W. PETTUS, *contra*, cited *McGown v. Sprague*, 23 Ala. 524; *Kirksey v. Fike*, 27 Ala. 383; *Smith v. Moore*, 35 *ib.* 76.

STONE, J.—The answers of the defendants fully and emphatically negative all fraud charged upon them, in the matter of the sale to, and purchase by them, of the goods and effects which were affected by the interlocutory injunction. The gravamen of the complainant's bill—the peculiar ground on which he rests his right to have these goods and effects seized, and the defendants restrained from disposing of them—is the alleged fraud in the sale from Cavett & Saunders to the Connors. This being denied, the injunction was rightly dissolved for that reason, if for no other.

[2.] But it is our duty to dispose of the questions raised on the attachment and its dissolution.

The present bill was filed under the Code, chapter 6, title 4, part 3, page 529, and the enlargement of the remedy therein provided, by the act approved February 15th, 1856.—Pamphlet Acts, 54.. Section 2954 of the Code provides, that “writs of *ne exeat*, and equitable attachments, may issue on equitable debts and demands, under the same circumstances, and courts must observe in the issue of such writs, the provisions of courts of law in relation to bail and attachment writs, except so far as the same are altered by this Code.” Equitable attachments had been provided for by the act of 1846, (Pamphlet Acts, 17,) and many of the provisions of that statute were continued of force by section 2956 of the Code.

By the act of 1856 it is declared, “that a writ of attach-

ment may be issued out of the court of chancery, on the application of any surety, endorser, accommodation drawer, acceptor, or maker, of any bond, bill, note, or other contract in writing, against the principal debtor, to be levied on the property or effects of the defendant, whether held by a legal or equitable title, whenever such surety, endorser, acceptor, maker, or drawer, could sue out an attachment at law, if he was a creditor of such principal debtor;" and that "the provisions of the statutes now in force, in reference to attachments at law, must be observed in the issuance of such attachments."

The complainant in this bill alleges, that he is an accommodation drawer for Cavett & Saunders,—the debt not paid at the filing of the bill; and hence, the entire equity of his bill rests on the act of 1856, copied above, and section 2954 of the Code.

This record contains no formal order dissolving the attachment; but the chancellor, and the counsel on both sides of the controversy, treat the case as if the attachment had been dissolved. We will also treat the question in the same light, and proceed to consider the appeal on that hypothesis.—See act of 1858, § 6; Pamphlet Acts, 230.

It will be observed, that section 2954 of the Code declares that, in issuing equitable attachments, the *courts must observe the provisions of courts of law in relation to bail and attachment writs*. And the act of 1856 confers the right to issue attachments out of chancery, *only when such surety, endorser, acceptor, maker, or drawer, could sue out an attachment at law, if he was a creditor of such principal debtor*; further, that *the provisions of the statutes now in force, in reference to attachments at law, must be observed in the issuance of such attachments*.

It is objected by appellees, that in suing out the present attachment, the complainant did not observe the provisions of the statute now in force in reference to attachments at law. The particular ground of objection is this: The statute which authorizes the issuance of an attachment at law, in favor of a creditor, against a debtor who has, as is charged

in this bill, *fraudulently disposed of his property*, requires the plaintiff to make oath "*that the attachment is not sued out for the purpose of vexing or harassing the defendant.*" Neither the bill, nor the affidavit in this case, contains that averment; and for this omission it is contended, that the chancellor rightly dissolved the attachment.

We agree with the chancellor, that the averment copied above was material. It was, at an early day, made a part of the oath to be taken in suing out attachments at law, and has been steadfastly preserved through all the changing phases of our legislation on that subject. We discover in this language a nice legislative policy, in this, that notwithstanding a creditor may bring himself within the letter of the statute, still his conscience shall purge itself of all purpose to vex or harass, before he shall be armed with this extraordinary process of the law. Kindred questions under attachment laws have been considered, and have received the same solution which we give to this.—*Thompson v. Raymon*, 7 How. Miss. 186; *Page v. Page*, 2 Sm. & Mar. 266; *Hopkins v. Grissom*, 26 Miss. 143; *Taylor v. Smith*, 17 B. Mon. 536.

The case of *Conklin v. Harris*, (5 Ala. 213,) is not opposed to this view. The attachment in that case was sued out against a non-resident debtor; and it is no part of the affidavit for an attachment on that ground, *that the ordinary process of law can not be served on the defendant.*—Clay's Digest, 54, § 3.

[3.] We do not understand the appellant as seriously controverting this proposition. He contends, however, that the chancellor should not have dissolved the attachment, without first giving him an opportunity to perfect the ground of his attachment by an amendment. In support of this proposition, he relies on *Calhoun v. Cozzens*, 3 Ala. 498, 502. The case cited certainly sustains the argument, unless a distinction can be taken between that case and this. We do not propose now to consider whether that case is reconcilable with a well settled rule of chancery law—namely, that when a bill, on which an interlocutory

injunction has been obtained, is amended, such amendment is at the cost of the injunction, unless the court allowing the amendment make an order for the continuance of the injunction.—See 1 Dan. Ch. Pr. 483-7. But there is an organic distinction between that case and this. The bill in the case of *Calhoun v. Cozzens* made a case for the exercise of original equity jurisdiction; namely, a proceeding by a married woman, having no trustee, to protect her separate estate from sale under an execution against her husband. The equity of the bill consisted, not in the necessity for an injunction, but in the civil disability of the wife to maintain an action at law. Her rights, under the circumstances, were maintainable alone in equity; for she could sue nowhere else. The injunction was simply the means of giving effect to the decree to be rendered, by arresting the erroneous proceedings of the law court. In this case, it is the attachment, properly issued, which gives the plaintiff a standing in court. Without that process, he has no cause of action before any tribunal.—*Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Saunders v. Watson*, 14 Ala. 198; *Buford v. Francisco*, 3 Dana, 68; *Moran v. Daves*, Hop. Ch. 365.

In the case of *McGown v. Sprague*, (23 Ala. 524,) the question was whether the bill conformed to the act of 1846, as an equitable attachment. This court said, "Neither the affidavit, nor the bond, seems to have been filed according to the requisitions of the statute; and, indeed, it does not seem to have been intended to be, at the filing of the bill, a proceeding under the statute. When proceedings of this nature are authorized only by statute, the uniform decisions of this court are, that such proceedings, when taken, must be substantially conformable to the directions of the statute."

In the case of *McKenzie v. Bently*, (30 Ala. 142,) the affidavit and bill were sufficient, but the attachment was issued without any previous order or fiat therefor. This court held, that the proceedings were void, and that the court of chancery *did not, and never could, have any authority to,*

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render any decree in favor of complainants under that bill. See, also, *Kirksey v. Fike*, 27 Ala. 383; *Walthall v. Rives*, 34 Ala. 91; *Smith v. Moore*, 35 Ala. 76.

The result of our former decisions is, that although amendments of chancery pleadings are much encouraged in this State, yet, when the equity of a bill depends on a statutory attachment, if the sworn averments of the bill, or the affidavit, or the fiat or order, be substantially insufficient to uphold the jurisdiction, then the chancery court has not, and never can have, authority to render the decree prayed for; and no amendment can retroact, so as to legalize and save an attachment previously issued without proper authority.—See *McReynolds v. Neal*, 8 Humph. 12.

The decree of the chancellor, in both aspects, is affirmed.

CLOUD vs. WHITING.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Estoppel en pais against maker, from setting up defenses against assignee of note.*—Where the maker of a promissory note, in response to an inquiry by one who is about to purchase it, states that he has no defense against it, this does not preclude him from setting up against such purchaser a defense subsequently arising out of the original contract, *e. g.*, a total failure of consideration; but, where the note is purchased by the assignee on the faith of a promise by the maker to pay it, the latter is thereby estopped from asserting the invalidity of the note as between himself and the payee, either on the ground of fraud, or subsequent failure of consideration, and will be compelled to pay the assignee at all events.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by John Whiting, against N. B. Cloud and A. Underwood; and was founded on the defendants' promissory note for \$3,240, dated the 1st June,

1856, and payable twelve months after date, to the order of M. P. Blue, by whom it was endorsed to the plaintiff. On the trial, as the bill of exceptions states, "the plaintiff read to the jury the note sued on, and then proved that, about the 6th June, 1856, the defendants came to him, together with M. P. Blue, the payee of the note, and requested him to take said note from Blue, and to credit a judgment which he had against Blue and another person, on account of said note, with the sum of \$3,000, and also to advance to defendants the sum of \$2,500,—promising him that, if he would do so, they would repay said \$2,500 on the 1st January then next, and would probably pay the note at the same time, from funds which said Cloud expected to draw from his father's estate, but would certainly pay the note at maturity; that plaintiff assented to this, advanced the \$2,500 to defendants, and credited said judgment with \$3,000 as a payment, as requested and agreed on. The facts above stated were admitted by the defendants; and the plaintiff admitted that the \$2,500, so advanced by him, was repaid by the defendants before the commencement of this suit. The defendants introduced evidence tending to show, that said note was given by them to said Blue for the purchase of certain goods and chattels bought by them from him about the 1st June, 1856; that said Blue represented to them, at the time said contract was made and said note given, that said goods and chattels were free from all incumbrances; that they believed and relied on said representations, and would not have made the purchase but for such representations; that an execution, issued on a judgment rendered by the circuit court of Montgomery, was at that time in the hands of the sheriff of said county, and had been levied by him on said goods and chattels, and said Blue had given his consent in writing that the same might be sold by the sheriff without advertisement; that the said goods were afterwards sold by the sheriff, under an *alias* execution issued on said judgment; and that said defendants, at the time they purchased said goods and chattels, had no knowledge or infer-

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mation of said judgment, execution, or levy." This being all the evidence, the court charged the jury, in substance, that if they believed plaintiff bought the note, advanced the \$2,500 to defendants, and entered a credit of \$3,000 on the judgment, as above stated, "on the faith of a promise by the defendants to repay said \$2,500 on the 1st January next thereafter, and to pay said note at the same time probably, but certainly at its maturity," then they must find for the plaintiff. This charge, to which the defendants excepted, is now assigned as error.

ELMORE & YANCEY, for appellants.

WATTS, JUDGE & JACKSON, *contra*.

R. W. WALKER, J.—Where the maker of a note is inquired of by one wishing to purchase it, whether he has any defense against it, and answers that he has none, this estops him from afterwards setting up any defense which existed at the time, within his knowledge, but he does not thereby preclude himself from making a defense subsequently arising out of the original contract; such, for example, as a total failure of the consideration. When, however, the note is purchased by a third person on the faith of a promise by the maker to pay it, the latter is thereby estopped from setting up the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known to the maker at the time of such promise, or of subsequent failure of consideration; and will be compelled to pay the assignee at all events.—*Clements v. Loggins*, 2 Ala. 514; *Maury v. Coleman*, 24 Ala. 381; *Lanier v. Hill*, 25 Ala. 554; *Drake v. Foster*, 28 Ala. 654; *Plant v. Vogelien*, 30 Ala. 160; *Powers v. Talbott*, 11 Ind. 1; *Rose v. Wallace*, *ib.* 112.

Judgment affirmed.

GIMON *vs.* BALDWIN.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Competency of witness as affected by interest.*—Where separate actions of trover are instituted by the owner, against the hirer and sub-hirer of a slave, for a conversion arising from the unauthorized sub-hiring, the sub-hirer is a competent witness for the plaintiff, (Code, § 2302,) since a judgment against him would not be evidence for or against the latter, except in the sense in which it would be evidence against all the world.
2. *Admissibility of slave's declarations.*—The declarations of the slave, for whose conversion the action is brought to recover damages, are not admissible evidence for the defendant, unless shown to be a part of the *res gestæ* connected with the alleged conversion.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Dominick Gimon, against Henry C. Baldwin, to recover damages for the conversion of a slave named Brister. The only plea was the general issue. "On the trial," as the bill of exceptions states, "it was admitted by the defendant, that the plaintiff had hired the slave Brister to him, to work as a deck hand, by the trip, on the steamboat *Senator*; that said slave was discharged on the 1st October, 1858, said steamboat having ceased to run. It was admitted, also, that plaintiff had brought an action of trover against W. M. Terrell and others, owners of the steamboat *Lucy Bell*, for the conversion of the same slave; that the action in that case was commenced after this, and was still pending; and that the defendant in this case was solvent, and good for the amount claimed in the suit. There was evidence before the jury, also, that said slave belonged to plaintiff; was drowned while working as a deck hand on the *Lucy Bell*, and was worth \$1,500. The plaintiff then introduced said W. M. Terrell as a witness, to whose competency as a witness the defendant objected, on the ground that he was the captain.

and master, as well as a part owner of the *Lucy Bell*; that suit was pending against him and the other owners of said boat, to recover damages for the loss of said slave, on the ground that they had said slave on said boat without having hired him from plaintiff; and because said suit was still pending, and the testimony of said witness was incompetent. The plaintiff's counsel thereupon stated to the court, that he expected to prove by said Terrell that the defendant in this action, between the 1st and 5th October, 1858, came to the *Lucy Bell*, and hired said slave to him, to run as a deck hand on said boat. The court sustained the defendant's objection to the competency of said witness, and excluded him; to which the plaintiff excepted.

"The plaintiff introduced another witness, who testified, that he was the mate of the *Lucy Bell* in October, 1858; that he was in the engine-room on one occasion, and saw the defendant and said Terrell on the wharf together, with the slave Brister, and another slave, named Tarleton, near them; that said Terrell called witness out, and asked him whether he wanted any more hands; that he replied, 'he could do with two or three more'; that Terrell then said, in the presence of said Baldwin, 'Here are a couple of boys Captain Baldwin has to hire'; that said two slaves soon afterwards followed him on board the *Lucy Bell*, and he put them to work as deck hands. The plaintiff introduced other evidence, tending to show that said slave was drowned, while on the *Lucy Bell*, about the 5th October, 1858; and then again offered said Terrell as a witness, and proposed to prove by him, that said Baldwin hired said slave to the *Lucy Bell* at the time mentioned by said last witness; and that said slave, and also the slave Tarleton, were both entered to defendant's name on the books of the *Lucy Bell*, by an entry made at the time. The defendant renewed his objection to the competency of said witness, and the court sustained the objection; to which the plaintiff excepted.

"The defendant introduced evidence tending to show that said slaves, Brister and Tarleton, after they were dis-

charged from the *Senator*, applied to him to hire them on the *Lucy Bell*; that he refused to do so, without a permit from their owners, or agents; that Tarleton returned, with a permit from his mistress, but Brister returned without one; and that he thereupon peremptorily refused to hire Brister on the *Lucy Bell* without a permit. It was proved, also, that said Brister and Tarleton were 'partners', or worked together when on the same boat. The plaintiff objected, at the proper time, to the introduction of any evidence of what took place between said slaves and the defendant; but his objection was overruled, and he excepted."

The rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

L. S. LUDE, and WM. BOYLES, for appellant.

J. L. SMITH, *contra*.

A. J. WALKER, C. J.—This seems to have been the case of an alleged right of action in trover against two persons separately, for distinct torts. A recovery against one, and subsequent satisfaction, would have barred an action against the other.—*Spivey v. Morris*, 18 Ala. 254. But the judgment against one would not be evidence for the other, except in the sense in which it would be evidence against all the world, to prove the fact of the judgment. If it were satisfied, it would be one of the two facts—judgment, and payment of it—which would have been a defense in a subsequent action against the other party. It is not sufficient to render a witness incompetent under our Code, (§ 2302,) that a judgment would be available as a fact to the witness: it must be evidence for him as for parties and privies, operating by way of estoppel. *Harris v. Plant & Co.*, 31 Ala. 639; *Blakey v. Blakey*, 33 Ala. 611. The court erred in ruling the witness to be incompetent.

[2.] The conversation between the defendant and the two negroes could only be evidence as a part of the res

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gestæ. Those conversations are not shown by the bill of exceptions to have been connected with the act of the slaves in going on the boat, where they are alleged to have been put by the defendant as a hirer, or so near to it in point of time as to make it a part of the *res gestæ*; nor were they so connected with, or in such proximity of time to, any other material fact in the case. They were, therefore, not admissible in evidence.

Reversed and remanded.

KING vs. KENAN.

[DETINUE FOR SLAVES, AGAINST SHERIFF.]

1. *Lien of execution.*—An execution, regularly continued from term to term, is a lien on the personal property of the defendant within the county, (Code, § 2456,) from the time it is first placed in the hands of the sheriff.

2. *Validity of deed of trust for benefit of creditors.*—A deed of trust, executed by an insolvent debtor, to his mercantile partner as trustee, who is cognizant of his pecuniary circumstances, for the purpose of securing a debt due to the trustee's wife, arising from the investment of moneys belonging to her separate estate in the partnership business, and the use of the partnership assets by the grantor in payment of his individual debts; which conveys the grantor's residence and household servants, together with his interest in the partnership assets, after paying the partnership debts, then due, or afterwards created; postpones the law-day for more than three years; authorizes the retention of possession by the grantor, and the continuation of the partnership business, until the trust is closed according to its terms; and directs the trustee to settle up the partnership business, if any of the grantor's creditors should attempt to subject his interest therein to the payment of his debts, and to close the trust if default was made by the grantor in the annual payment of interest on the secured debt,—is fraudulent and void as against creditors.—Code, § 1550.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by William J. King, against

M. J. Kenan, the sheriff of said county, to recover a slave named John, with damages for his detention; and was commenced on the 7th November, 1859. The defendant pleaded *non detinet*, with leave to give any special matter in evidence; and issue was joined on that plea. The plaintiff claimed the slave under a purchase from W. B. Milton and M. A. Milton, his wife, on the 1st June, 1859; and the defendant, as sheriff, had levied an execution on him, on the 2d September, 1859, as the property of one P. L. Sink, from whom said Milton and wife derived title, as hereinafter more particularly stated.

On the trial, as appears from the bill of exceptions, the plaintiff introduced said P. L. Sink as a witness, who testified, that the slave sued for belonged to him on the 7th July, 1857, and was one of the slaves conveyed by him on that day, by deed of trust, to said W. B. Milton as trustee, to secure the payment of a debt due from him to Mrs. M. A. Milton; and that on the 21st March, 1859, the debt secured by the deed being unpaid, he sold said slave, with the others conveyed by the deed, to Mrs. Milton, in part payment of the debt, and executed to her a bill of sale. The execution of the said bill of sale and deed was proved by this witness, and both of said instruments were read to the jury. The deed was in the following words:

“State of Alabama, } This indenture, made and executed this 7th day of July, 1857, by and between Phillip L. Sink, of the first part, William B. Milton (trustee), party of the second part, and Maria A. Milton, wife of the party of the second part, as party of the third part, all of the State and county aforesaid, *witnesseth*, that, whereas the party of the first part borrowed of the party of the third part the sum of \$9,624 08, including interest to the 1st day of January, 1858, and, to secure the payment thereof, the party of the first part has this day executed his promissory note for that sum, payable to the party of the third part on the 1st January next, and has also agreed, in consideration of said loan, to execute this deed of trust, as a further security for the pay-

ment of said sum of money, which is the separate estate of the said party of the third part: Now, in consideration of the premises, and for and in consideration of the sum of ten dollars, to the party of the first part in hand paid by the party of the third part, the receipt whereof is hereby acknowledged, before the sealing and delivery of these presents, the party of the first part (the said Philip L. Sink) has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, transfer, and convey, unto the party of the second part and his personal representatives, the following described real and personal property, and choses in action, to-wit: the undivided half of the lot of land in the city of Selma on which the party of the first part now resides, fronting on Dallas street on the south, and on Washington street on the west, containing one acre, more or less, and owned jointly by the party of the first part and one A. H. Lloyd, with the appurtenances thereunto belonging; also, a negro man named John, about twenty-one years old, a negro woman named Jane, aged about thirty years, a negro woman named Polly, about fifty years, and the natural increase of said slaves; also, all the accounts, notes and debts of every description, due, or hereafter falling due, or contracted to or with, and belonging to the firm of Sink & Milton, which firm is composed of the parties of the first and second part, and is now doing a mercantile business in the city of Selma; also, the stock of goods now on hand, or hereafter to be purchased by the said firm for the purpose of carrying on the business in which they are now engaged; but it is expressly agreed and understood, that the interest in said accounts, notes, claims, debts, [and] stock of goods of said firm, now on hand and to be purchased as aforesaid, and herein transferred and conveyed, is the interest which the party of the first part shall have in them after the payment of all the partnership debts of said firm, now contracted, or hereafter contracted for the purpose of carrying on said partnership business as aforesaid; *to have and to hold* the above described real and personal property and

chooses in action, unto the party of the second part and his personal representatives ; and the party of the first part further covenants with the party of the second part, that he is seized as in fee of the undivided half of said lot of land, and that the said real and personal property is free of incumbrances ; that he has the title to the same, and the right to incumber and convey the same ; and he does hereby warrant the title to the same, unto the said party of the second part, free from the claim or claims of any and all persons whatsoever. *Nevertheless, these presents are upon the trusts, uses, and conditions following, to-wit :* that is to say, the party of the first part, upon paying the annual interest accruing on the sum of money specified in said promissory note, on the 1st day of January, A. D. 1859 and 1860, shall retain the possession of said real and personal property herein conveyed, until the 1st day of January, A. D. 1861 ; but it is further agreed, that should any creditor of the party of the first part levy on the stocks of goods herein conveyed, or the interest of said Sink in and to the same, or upon the accounts, notes, claims and debts herein conveyed, by garnishment process or otherwise, or should said firm of Sink & Milton be dissolved at any time before the 1st day of January, 1861, upon the happening of any or either of the events above specified, then the party of the second part is hereby authorized to close up the partnership affairs of said firm, and, after paying all the debts of said partnership from the partnership effects, shall apply the share of the party of the first part in the net proceeds of the firm to the payment of said promissory note, should any part thereof be then due ; and it is further agreed and understood, that should said promissory note and interest not be paid by the 1st day of January, 1861, then the party of the second part is hereby authorized to take possession of said real and personal property herein conveyed, and may, upon thirty days' previous notice of the time and place of sale given in some newspaper printed in the city of Selma, proceed to sell the same at public vendue to the highest bidder, on cash terms,

or so much of said property as may be necessary to pay said promissory note and interest thereon, or so much thereof as may be due, after first paying the expenses of sale and of this trust; and should the affairs of the partnership not be closed and settled before the 1st day of January, 1861, and the said promissory note, or any part thereof, be then due, the party of the second part shall then, with all convenient speed, proceed to close up the affairs of said partnership, and, after paying the debts thereof as aforesaid, apply the share of said Sink in the net profits to the payment of any amount due on said promissory note, as above provided; but, should the party of the first part fail to pay the annual interest accruing on said promissory note, on the 1st day of January, 1859, or 1860, then the party of the second part is hereby authorized to take possession of the said real and personal property, and proceed to sell said property, and to close up the affairs of said partnership, as hereinbefore provided to be done on the happening of the events before specified, and apply the proceeds to the payment of the expenses and said promissory note and interest, as hereinbefore provided; and whenever said promissory note, and interest that may be due thereon, are paid, from thenceforth the property hereby conveyed, and undisposed of at that time, shall revert and reinvest in the party of the first part, free from the trusts and uses of this conveyance. In testimony whereof," &c.

(Signed by the parties of the first and second part, and attested by two witnesses.)

The only witness introduced by the plaintiff was said P. L. Sink, the substance of whose testimony was as follows: The partnership of Sink & Milton was formed on the 6th October, 1856, and did a general mercantile business, besides buying and selling cotton. By the terms of the articles of partnership, each partner was to put \$10,000 capital in the firm, and they were to be equally interested in the business. Sink put into the business a stock of goods which he then had on hand, valued at \$18,000; and Milton put in, at different times, about \$13,000 in cash, which

belonged to his wife's statutory separate estate, and which he so represented at the time to Sink. At the time this partnership was formed, Sink was actually insolvent, but he was not aware of his pecuniary condition until about the 1st April, 1857. In February and March, 1857, during the temporary absence of Sink in New York, and without his knowledge or consent, the commission-merchants in Mobile to whom Sink & Milton shipped their cotton, and with whom Sink had business transactions prior to the formation of said partnership, applied the proceeds of the sale of cotton belonging to the firm, amounting to over \$20,000, to the payment of Sink's individual debts created before said partnership was formed; and in March, 1857, forwarded to Sink & Milton an account-current showing the application of said funds. Sink thereupon made a strict examination into his pecuniary condition, and discovered that he owed about \$10,000 more than his property was worth; and he immediately communicated the fact to his co-partner. On balancing the books of the firm, about the 1st July, 1857, it was ascertained that Sink individually owed the firm \$9,624 08 more than Milton owed it. Supposing that this sum was due from him to Milton, and being desirous to secure to Mrs. Milton the repayment of the funds belonging to her separate estate which had been invested in the partnership business, Sink executed to her, on the 7th July, 1857, his promissory note for \$9,624 08, as for so much money that day borrowed from her by him, payable on the 1st January, 1858; and at the same time, to secure its payment, executed the deed of trust above set forth. Said deed was not executed with any intention on his part to defraud or delay his creditors, but from an honest conviction that it was a debt of honor of high obligation, which it was his duty to secure so far as he could. At the time said deed was executed, no suits were pending against Sink, nor was he threatened with suits by any of his creditors, although many of his debts were then past due and unpaid; and he believed that it was the best possible arrangement that could be made, both for himself and

for his creditors, as it would enable him to acquire means to pay off all his debts from his partnership business. Said deed conveyed all the grantor's property of every description, except about \$300 worth of household furniture, and outstanding notes and accounts amounting to about \$1,000. After the execution of said deed, Sink continued in possession of the real and personal property conveyed by it, without paying rent or hire, until the 21st March, 1859, when he sold the said slaves to Mrs. Milton, with the assent of her husband, in part payment of the debt secured by the deed, executed to her a bill of sale, and delivered possession to her. The partnership business of Sink & Milton was continued after the execution of said deed as before—goods were bought and sold, and the partners drew from the firm the means necessary to support their families—until the fall of 1858, when the firm was dissolved by mutual consent, Milton taking the stock of goods on hand, valued at \$6,000, and agreeing to pay that amount of the partnership debts out of his individual funds.

The defendant read in evidence the record of a judgment recovered by Frothingham, Newell & Co. against said P. L. Sink, in the circuit court of Dallas, on the 18th November, 1858; which judgment was founded on a debt contracted in the spring of the year 1856. An execution on this judgment was issued on the 1st January, 1859, and was placed in the hands of the defendant, as sheriff of the county, by whom it was returned "no property found"; and an *alias* was afterwards regularly issued, which was levied on the slave in controversy on the 2d September, 1859. It further appeared, from the testimony of said Sink, that said slave was in Dallas county while in his possession, and, after the sale by Milton and wife to the plaintiff, was hired as a deck hand on a steamboat running on the Alabama river, and was in said county regularly once or twice every week.

The above being all the evidence, the court charged the jury, that they must find for the defendant, if they believed the evidence; to which charge the plaintiff excepted, and he now assigns it as error.

BYRD & MORGAN, for appellant.

PETTUS, PEGUES & DAWSON, *contra*.

STONE, J.—The following are among the uncontroverted facts in this case: That Mr. Sink was the owner of John, the slave in controversy, up to July 7th, 1857; that on that day he executed a deed of trust to Wm. B. Milton, trustee, conveying the slave to him, in trust to secure a large debt to Mrs. Maria A. Milton; that the slave remained in the possession of Mr. Sink, in Dallas county, until March 21st, 1859, when, in part payment of the debt to Mrs. Milton, Mr. Sink conveyed the slave to her by bill of sale, and the possession then went to Mrs. Milton, who still retained him in Dallas county, until she sold and delivered him to Mr. King, also of the same county; that before the said 21st March, 1859, Frothingham, Newell & Co. recovered a judgment, in said Dallas county, against Mr. Sink, and sued out an execution upon it, and placed it in the hands of the sheriff for collection; that from that time, until the slave John was seized by the sheriff of Dallas, said execution was regularly renewed from term to term, and kept in the hands of said sheriff; and that, up to that time, the slave was owned in said county, and was regularly in it at least once a week. On these plain facts, the execution in favor of Frothingham, Newell & Co. operated a lien on said slave John, from the time it first went into the sheriff's hands, unless Mrs. Milton's title can relate back, and rest on the deed of trust of July, 1857.

[2.] Having premised the foregoing facts, about which there seems to have been no contest in the court below, we feel bound to declare, that the testimony in this cause, if believed, made the case of a conveyance with intent to delay, hinder and defraud the creditors of Mr. Sink. The facts connected with the making of the deed, and its purpose, are shown by the deed itself, and by the testimony of Mr. Sink. The chief features of the transaction are the following: Mr. Sink and Mr. Milton formed a mercantile copartnership,—Mr. Milton employing the trust funds of

Mrs. Milton's separate estate in his hands, in supplying his share of the capital stock. The funds of the firm were used in paying the individual antecedent debts of Mr. Sink, by which he became indebted to the firm in some nine thousand dollars. To secure this indebtedness, Mr. Sink executed to Mr. Milton, as trustee, the deed of trust, the chief contents of which will be hereafter stated, for the express purpose of securing said debt of nine thousand dollars to Mrs. Milton, the wife of the trustee. At the time this deed was executed, Mr. Sink was insolvent, and Mr. Milton knew it. The debt of nine thousand dollars, secured by the deed, was made payable the first day of January, 1858.

The deed of trust conveyed the family residence and house servants, three in number, belonging to the said Sink; also, all the notes and accounts due the firm of Sink & Milton; "and also the stock of goods now on hand, or hereafter to be purchased by the said firm of Sink & Milton, for the purpose of carrying on the business in which said firm is now engaged; but it is expressly understood and agreed, that the interest in said accounts, notes, claims, debts, stock of goods of said firm now on hand, and to be purchased as aforesaid, and herein transferred and conveyed, is the interest which the party of the first part shall have in them, after the payment of all the partnership debts of said Sink & Milton now contracted, or hereafter to be contracted for the purpose of carrying on said partnership business as aforesaid." The deed then provides, that Mr. Sink was to retain possession of said real and personal property until January 1st, 1861,—he paying interest on the first of January, 1859 and 1860. The law-day of the deed is fixed at January 1st, 1861,—near three and a half years after its date, and three years after the maturity of the debt secured. There is a provision in the deed, that if any creditor attempted to subject Mr. Sink's interest in the mercantile establishment to the payment of his debts, then Mr. Milton was directed to wind up the mercantile establishment; and further, if Mr. Sink failed to pay the inter-

est in January, 1859, or January, 1860, then the property was to be sold, and the trust closed. These are all the stipulations of the deed, necessary to be noted here.

This deed, then, provides for the continued enjoyment by Mr. Sink of his property for three and a half years, and the continuance of his mercantile business by selling, buying, selling again, and again reinvesting for a like period, without any noticeable change in his business, or the manner of conducting it; this, too, by an insolvent debtor, dealing with one who had notice of his insolvency. We hold, that the case made by this record is not distinguishable in principle from *Ticknor v. Wiswall*, 9 Ala. 305; *Constantine v. Twelves*, 29 Ala. 607; and *Price v. Mazange*, 31 Ala. 701. In each of these cases, the deeds were pronounced fraudulent as against creditors; and the present transaction must receive the like condemnation.

The charge of the circuit court is strictly in accordance with our views, and the judgment must be affirmed.

FOUNTAIN vs. BROWN.

[CONTESTED PROBATE OF WILL.]

1. *Relevancy of evidence to show incapacity of testator, fraud, or undue influence.*—Where the probate of a will is contested, on the grounds of fraud, undue influence, and mental incapacity on the part of the testator, it is permissible to inquire whether the provisions of the will are just and reasonable, and consonant with the state of the testator's family relations; and proof of the value of his estate, and of the pecuniary circumstances of those relatives who, in case of intestacy, would be his heirs-at-law and distributees, is admissible evidence as bearing on this question.
2. *Same.*—In such case, it is competent for the contestants to prove that the testator was 'diseased' before the execution of the supposed will.
3. *To what witness may testify.*—A witness may, although not an expert, testify to the fact that a person was 'diseased.'
4. *General objection to evidence.*—A general objection to an entire question, a part of which calls for legal evidence, may be overruled entirely.

5. *Relevancy of evidence to show incapacity of testator.*—The fact that the testator had conveyed to third persons, before the execution of the supposed will, some of the property disposed of by it, is competent evidence for the contestants, as tending to show the failure of his memory.
6. *Opinion of witness on question of sanity.*—A witness who was long and intimately acquainted with the testator, may state his opinion on the question of sanity or insanity, in connection with the facts on which it is based.

APPEAL from the Probate Court of Monroe.

IN the matter of the probate of a paper, which was propounded for probate as the last will and testament of Elias Brown, deceased, by Hugh T. Fountain, the executor therein named; and the probate of which was contested by several of the testator's children and grand-children, on the grounds of fraud, undue influence, and mental incapacity on the part of the testator. On the trial before the jury, as appears from the bill of exceptions, the court allowed the contestants, against the objections of the proponent, to ask a witness the following questions: "What is the pecuniary condition of the children of Mahala Nettles?" "What is the pecuniary condition of the children of Jane Dunn?" Mahala Nettles and Jane Dunn were daughters of said testator, and were both dead at the date of the paper propounded for probate. The proponent reserved exceptions to the allowance of these questions. The court also allowed the contestants, "for the purpose of showing the unnatural character of said will," to read in evidence the appraisement and inventory of the testator's estate, and to show the value of the land devised by the will to one Moses Matthias; and, "for the purpose of showing that said testator had devised by said will land which did not belong to him at the time," to read in evidence a deed, by which a tract of land was conveyed by one McCall to said testator, and on which was endorsed a transfer and assignment by the latter to one Andress,—the assignment being dated about two years before the date of the will; to all which rulings of the court exceptions

were reserved by the proponent. The contestants asked one Bohannon, a witness, the following question: "Was said testator diseased before or after the execution of said will?" The court allowed the question to be asked and answered, against the proponent's objections, and he excepted.

The proponent introduced one McClammey as a witness, "who testified, in answer to questions asked him, that he had known said testator for thirty or forty years, was well and intimately acquainted with him, had travelled thousands of miles with him, had seen him transact business, had heard him preach for many years, had frequently stopped at his house all night, and had conversed with him in relation to his family affairs, and in relation to making his will; that the last time he conversed with him on that subject was in 1858, and the last time he had heard him preach was in 1860." On these facts, the proponent proposed to ask said witness, "whether or not, in his opinion, said testator was a man of sound mind on the 21st March, 1857," the date of said will. The court would not allow the question to be asked, and the proponent excepted.

All the rulings of the court to which exceptions were reserved by the proponent, are now assigned as error.

S. J. CUMMING, for appellant.

J. W. POSEY, *contra*.

R. W. WALKER, J.—If the testator is of sound mind, he may dispose of his property as he pleases; and the will will not be avoided because the disposition is unnatural and unequitable.—*Mosser v. Mosser*, 32 Ala. 566. But, while this is true, the law is well settled, that where a will is contested, upon the ground of undue influence or incapacity, it is permissible to inquire whether the provisions of the will are just and reasonable, and consonant with the state of the testator's family relations. If they are, that is a circumstance conducing in some degree to establish the capacity of the testator, and the absence of fraud or undue

influence in the execution of the will; while, on the other hand, the fact that the will makes an unnatural and inequitable distribution of the property, is a circumstance tending in the opposite direction, and is proper to be weighed by the jury in pronouncing on the issue *devisavit vel non*.—*Stubbs v. Houston*, 33 Ala. 563; *Hughes v. Hughes*, 31 Ala. 526; *Allen v. Prater*, 35 Ala. 174. The pecuniary condition of the testator's grand-children, who would have been distributees of his estate in case of intestacy, the value of the property devised to Matthias, and the inventory and appraisement showing the extent and value of the testator's estate, all reflected light upon the character of the will, and were properly allowed to go in evidence to the jury.

[2-4.] It was competent for the contestants to show that the testator was 'diseased' before the execution of the will; and our previous decisions settle the law to be, that a witness who is not an expert may testify to the fact that a person was 'diseased.'—*Blackman v. Johnson*, 35 Ala. 252; *Barker v. Coleman*, 35 Ala. 221. It is clear, therefore, that a part, at least, of the question to the witness Bohannon, was legal; and the rule is, that a general objection to an entire question, a part of which calls for legal evidence, may be overruled entirely.—*Sayre v. Durwood*, 35 Ala. 247.

[5.] The fact, that before the will was made, the testator had conveyed to third persons some of the property disposed of in the will, was competent evidence for the contestants, as it tended to show the failure of the testator's memory, and thus bore on the question of his intellectual condition and capacity.—*Stubbs v. Houston*, 33 Ala. 559; *Walker v. Walker*, 34 Ala. 473.

[6.] We must hold, however, under the influence of the previous decisions of this court, that the court erred, in refusing to permit the witness McClammey to state his opinion, in connection with the facts testified to by him, as to the sanity of the testator.—*Stubbs v. Houston*, 33 Ala. 559, 564; *Carmichael v. Carmichael*, 36 Ala. 616, and authorities cited.

As the other questions presented by the record may not arise in their present form on another trial, we will not consider them.

For the error pointed out, the decree must be reversed, and the cause remanded.

FOSTER vs. HOLLY.

[ACTION TO RECOVER DAMAGES FOR LOSS OF SLAVE.]

1. *What is care or negligence on part of stationary vessel.*—Although it might be affirmed, as a legal proposition, ‘that if a skiff was fastened in a safe and secure place unless rendered ‘insecure and unsafe by the negligence of a passing vessel, she was not in an improper place, and was guilty of no neglect by being at such place’; yet it certainly would be in an improper place, if fastened in a manner which rendered it difficult to be removed, in the channel of a river along which vessels were frequently passing.
2. *Same, by vessel entering harbor.*—A vessel, entering a harbor, is bound to exercise ordinary care to prevent accidents; which is a question of fact, to be determined by the jury from the character of the harbor, the number of vessels accustomed to frequent it, the time of the day or night when the vessel enters, and the other circumstances of the particular case; and a charge to the jury, instructing them that such vessel “is bound to keep the most vigilant watch,” is an invasion of their province.
3. *Liability for damages between colliding vessels.*—To preclude a recovery of damages for injuries caused by a collision between two vessels, on the common-law doctrine which denies a recovery to either party where both are at fault, the plaintiff’s fault must have occurred at the time of the accident, and contributed proximately to it; but, if the consequences of the defendant’s negligence, which caused the injury, might have been avoided by the exercise of ordinary care on the part of the plaintiff, his failure to exercise that degree of care precludes him from any redress.
4. *Same.*—Although the act of fastening a skiff in the channel of a navigable river, along which vessels are frequently passing, in such a manner that it cannot be conveniently and expeditiously removed, is an act of negligence on the part of the owner, or person having charge of the skiff; yet it cannot be said to contribute proximately to a collision with a passing vessel, caused by the negligence of the persons in charge of the vessel, and, consequently, does not preclude a re-

covery against the owners of the vessel for damages resulting from the collision.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE complaint in this case was in the following words:

<p>“W. D. F. Holly vs. David Foster, and William Foster.</p>	}	<p>The plaintiff claims of the defend- ants fifteen hundred dollars, for that whereas, heretofore, to-wit, on the 23d day of October, 1859, a certain schooner, called <i>Clotilda</i>, of which one Wright is and was master, and which is and was at the time the property of said defendants, was sailing up the bay of Mobile, between Pilot's island and the city of Mobile, while a skiff, or small boat, in which was a slave named Alfred, the property of plaintiff, of the value of fifteen hundred dollars, was lying still on the waters of the bay, tied to a sawyer, or log, therein situated; and the master and crew of said schooner navigated and managed her so carelessly, and with such gross negligence, that she ran afoul of the said skiff, causing said skiff to be upset and submerged; whereby said slave was drowned, deprived of life, and wholly lost to plaintiff.”</p>
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The cause was tried on issue joined on the plea of not guilty. “On the trial,” as the bill of exceptions states, “the evidence tended to show that, on the morning of the 23d October, 1859, which was Sunday, the negro Alfred, who belonged to the plaintiff, got into a skiff, with a white man, to whom the skiff belonged, and went out in front of the city to fish; that the skiff was fastened, by a chain, to a snag in the channel of the river, where boats and vessels continually pass and repass; that the skiff was nearer the eastern than the western shore, two-thirds of the distance being on the western side; that said snag had been in that part of the river for several years, but had been removed about a month or more prior to that time, and had drifted about fifty feet south of its former position; that the chain, by which the skiff was fastened to the snag, was from twelve to fifteen

feet long, and the skiff had floated, with the tide, some twelve feet below the snag; that the schooner *Clotilda*, which was owned by the defendants, was coming up the river, against the tide, between ten and twelve o'clock in the morning of that day; that said schooner, when first seen, was distant from the skiff about a quarter of a mile, and was in the channel of the river commonly used by all vessels, ascending or descending; that the wind at the time was north-east; that a little while before the schooner reached the skiff, and when distant from it between one hundred and fifty and two hundred yards, all hands on the schooner were engaged in taking in sail, preparatory to landing at one of the city wharves; that when the schooner was about thirty yards from the skiff, one of the men on her, while hauling in the flying-jib, observed the skiff about thirty yards in front, and gave the alarm, 'Boat ahead'; that the mate of the schooner immediately gave the order to luff, and the wheel was immediately put down, which turned the schooner's head to the east; that a collision between the schooner and the skiff occurred before the course of the former could be changed after the alarm, and the plaintiff's said negro was drowned; that the white man in the skiff clung to the anchor which was hanging to the bow of the schooner, and was saved by the crew; that a boat was lowered from the schooner, to search for the negro, but, not finding him, and a sail-boat coming up to render assistance, the schooner pursued her course.

"The evidence further tended to show, that the schooner was going at the rate of three or four miles an hour, but had slackened her head-way, before the collision occurred, by taking down her sails. A witness, who was on the schooner, stated, that he got a glimpse of the skiff just before the order was given to take in sail, but thought from her position that she was playing about the river, and did not know that she was fastened; that he did not notice the skiff any further, and did not give any notice that he had seen her. It was in evidence, also, that the persons in the skiff had an uninterrupted view of the schooner approach-

ing them for a quarter of a mile off, and made no effort to get out of the way of the schooner until she was near them, when the white man tried to unloose the chain, but did not succeed, and the negro tried to push the skiff off, but could not; and that the skiff could have easily gotten out of the way of the schooner, if she had not been fastened. It was also in evidence, that the persons in the skiff cried out to the schooner, and raised a paddle as warning when the schooner was near; but their cries were not heard, and the paddle was not seen, by those on the schooner. It was in evidence, also, that the course of a schooner, of the *Clotilda's* size, and going at the rate she was, might or might not be changed, within one hundred and fifty or two hundred feet; but the ease and quickness with which it could be done depended much on the sailing qualities of the vessel, and on the quickness with which she answered her helm. It was further in evidence, that the space between the eastern shore and the snag was about one hundred and thirty yards, and about two hundred yards between the snag and the western shore; that there was water enough on either side of the snag for the schooner to pass; that the schooner was of about one hundred and twenty tons' burden, and was returning to Mobile from Texas; that she had no pilot on board, but was under the charge of the captain, who had served as such for twenty years, had been to and from the port of Mobile for about nine years, and, within the last two or three years, had several times piloted his own boat up and down the channel, and was well acquainted with it; that said schooner had her full complement of men and officers, but two of the men, though on duty, were sick; that the captain was acting as pilot at the time of the collision, and was at the helm, and that the customary look-out was kept. It was in evidence, also, by pilots on said river, that it was usual and customary for masters of vessels of the size and tonnage of the *Clotilda*, well acquainted with the channel, to take their own vessels into port without a pilot; that at the time said schooner was ascending the river, and while some

four hundred yards from her, another vessel, about the same size, or somewhat larger, called the *Victory*, was seen descending ; that the two vessels were approaching each other at the rate, respectively, of four and five miles an hour, and each was watching the other, being apprehensive of a collision ; that there would have been great danger of a collision between the two vessels, if the *Clotilda* had changed her course to the west, she being to the east of the *Victory*, and that she would have run aground if she bore to the east ; that the schooner ran across the chain, by which the skiff was fastened to the snag, drew the skiff in, and struck her, scraping the snag, and thus overturned her ; that no cry from the skiff was heard on the schooner, and no signal was seen ; that those on board the *Clotilda* did not know, until after the collision, that the skiff was fastened ; that if the skiff had not been fastened, it would, from the manner in which the schooner struck it, have passed safely along the side of the schooner ; and that if it had not been fastened, a push, given to it by one of the men just before the collision, would have cleared it of the schooner, and the collision would not have happened. The proof tended to show, also, that there was plenty of room east of the snag, and plenty of water for the schooner to pass the skiff on that side, though one of the defendants' witnesses thought there was not ; also, that the snag could be seen two or three hundred yards off, and was seen by the pilot of the *Victory* one hundred and fifty yards above the place of collision ; and said pilot also saw, at that distance, before the collision took place, that the skiff was fastened to the snag. The tide was running out at the time, and the *Clotilda* was coming up against the tide. The white man who was on the skiff testified, that the skiff was on a line between the snag and the schooner when first seen by him ; but other witnesses testified, that the skiff was lying across the stream, with her head to the east."

The above being all the evidence introduced, the court charged the jury, at the request of the plaintiff, as follows :

"1. It is for the jury to determine whether both or either of the parties was guilty of negligence.

"2. The jury are to judge whether the plaintiff was at fault in fastening the skiff to the snag; and if they believe that, by fastening her to the snag, she was in a safe and secure place, unless rendered insecure and unsafe by the negligence of the schooner, then the skiff was not in an improper place, and was guilty of no neglect by being at such place.

"3. A vessel, entering a harbor, is bound to keep the most vigilant watch, to avoid a collision with other vessels, at anchor or in motion.

"4. Because a skiff, or a small boat, is in a wrong place, it will not justify a schooner in running over her, if she could have avoided it by proper diligence."

The defendants excepted to the second and third of these charges, and then requested the court to give the following charges:

"1. If the jury believe, from the evidence, that the schooner had, at the time of the collision, a sufficient number of competent officers and men for her management, and they used ordinary care and diligence to prevent a collision with the skiff, then the defendants are not liable for the consequences of the collision.

"2. If the skiff was chained to a snag in the channel of the river, and in the common track of vessels passing up and down the river; and those in the skiff could see the schooner coming up on them, and did not make timely efforts to loose the skiff and get out of the way,—then the plaintiff cannot recover.

"3. If the evidence shows, that those who had control of the skiff fastened it, with a chain, to a snag in the channel of the river, where boats and vessels were known to be passing and repassing continually, the persons in charge of said skiff would be chargeable with a want of proper care and prudence, and the defendants would not be chargeable with the consequences of the collision, if the master and

crew of the schooner exercised ordinary care to avoid the collision.

"4. If the jury believe, from the evidence, that the persons in charge of the skiff placed her in the channel of the river, where vessels were constantly passing and repassing, and, by fastening her with a chain to a snag, prevented her from getting out of the way of the schooner, the plaintiff must abide the consequences of the misconduct of those in charge of the skiff, and cannot recover in this action.

"5. If the jury believe, from the evidence, that there was a want of due care and diligence on the part of the master and crew of the schooner, in not avoiding the skiff, and that this negligence could have been avoided by the exercise of due diligence and ordinary care on the part of those in charge of the skiff, then the plaintiff cannot recover.

"6. If the jury believe that the person in charge of the skiff, with the plaintiff's negro, took the skiff on Sunday morning, and fastened it with a chain to a snag, near the middle of the channel of the river, where boats and vessels are passing constantly; and that the skiff, when the danger of a collision was apparent, could not be removed out of the way of the schooner, in consequence of being thus fastened,—then the plaintiff cannot recover in this case.

"7. If the jury believe, from the evidence, that the persons in charge of the skiff fastened her to a snag, in the channel of the river, where vessels were constantly passing and repassing, and remained there several hours, and that the schooner ran over her while in that condition, and the negro was drowned; then, the plaintiff cannot recover, unless the negligence of the master and crew of the schooner was gross or wanton.

"8. If the jury believe, from the evidence, that the master and crew of the schooner used ordinary care and diligence in coming up the river, and seeing the skiff at one hundred and fifty or two hundred feet in the channel of the river, but not knowing that she was fastened, made no efforts or arrangements to avoid her; and that the master

and crew of the schooner only became aware of the true condition of the skiff when it was too late to avoid a collision,—then, it could only be required of them to exercise such care and diligence, in the management of the schooner, as to do no more injury than was inevitable.

“9. If the jury believe, from the evidence, that the master was prevented from sailing farther to the west by the belief that his schooner would probably have come in collision with the *Victory*; and that the master and crew of the schooner, so soon as they discovered the situation of the skiff, used their best skill and judgment, and employed the means at their command, to avoid and prevent the collision,—then the plaintiff cannot recover.”

Of these charges, the court gave the first and eighth as asked, and also gave the seventh with a qualification, (which is not stated fully in the bill of exceptions,) but refused the others; and the defendants excepted to their refusal.

The charges given, and the refusal of the charges asked, are now assigned as error.

R. H. SMITH, and DANIEL CHANDLER, for appellants.

E. S. DARGAN, JNO. T. TAYLOR, and JNO. HALL, *contra*.

A. J. WALKER, C. J.—It is probable that the tendency of the second charge given by the court was to mislead the jury; but we will not reverse on that account. If in fact the place where the skiff was hitched was safe and secure, except as rendered otherwise by the negligence of defendants' vessel, we suppose it might be affirmed, as a legal proposition, that it was in a proper place. But a skiff would certainly be fastened in an improper place, if hitched so as to be difficult of removal, in the channel along which vessels are frequently passing. The place would be improper, because of the peril to itself, and to other vessels which might be passing.—*The Scioto*, Davies' Rep. 365; 1 Parsons on Maritime Law, 201; *Strout v. Foster*, 1 How. (U. S.) 89. And it could scarcely be said.

of a vessel thus situated, that it was safe and secure except as it might be affected by negligence in the navigation of some other vessel.

[2.] The third charge given asserts, that a vessel entering a harbor "is bound to keep the *most vigilant* watch." Undoubtedly, a vessel entering a harbor is always bound to exercise great care and diligence.—1 Parsons on Maritime Law, 201; *Culbertson v. Shaw*, 18 How. 584; *Ward v. Dowman*, 6 McLean, 231. The law exacts the exercise of ordinary care. What is ordinary care, must depend upon the circumstances of each case. The degree of vigilance which would be ordinary care on the part of a vessel entering a rarely frequented port in the day-time, would not be ordinary care in a vessel entering a much frequented port, abounding in ships, in a dark night. The law exacts an increase of vigilance with the circumstances which increase its necessity.—*Kelly v. Barney*, 2 Kern. 429; *The Scioto*, Davies' Rep. 361. Whether or not the circumstances of this case were such as to require the very greatest vigilance, was a question for the jury. The court should have instructed the jury to consider the number of vessels accustomed to frequent the port of Mobile, whether it was day-time or night, and any other circumstances in the case affecting the question; and left it to the jury to determine what degree of vigilance was requisite to fill the rule requiring ordinary care. Negligence is, ordinarily, a question for the jury.—*Hibler v. McCartney*, 31 Ala. 506. This charge was erroneous, because it invaded the province of the jury.

[3.] We will be aided to a proper comprehension of the questions raised by the refusals to charge as requested, by ascertaining first some of the leading principles which govern in cases of injuries, resulting from the mutual fault of the two parties. It is a general doctrine, long known in the common law, that where the injury is the result of the concurring faults of the parties, no action accrues to either. In the courts of admiralty, the burden of the injury is apportioned upon equitable principles.—Angell on the Law

of Carriers, §§ 633, 556. Under the common-law doctrine, which controls in this case, it is not sufficient to preclude the plaintiff's recovery, that he was in fault; but his fault must be such as contributed *proximately* to the injury.—*Steamboat Farmer v. McCraw*, 26 Ala. 189; *Grant v. Moseley*, 29 Ala. 304; Chitty on Carriers, 273; *Trow v. Vermont C. R. R. Co.*, 24 Verm. 487; *Kerwhacker v. Cleaveland, C. & C. R. R. Co.*, 3 Ohio State Rep. 172; *Dowel v. General S. N. Co.*, 5 El. & Bl. 195; *Davies v. Mann*, 10 M. & W. 546; *Cummins v. Presley & Spruance*, 4 How. 315. The negligence which is the proximate cause of injury, and deprives the injured party of a right of action, is that which occurs at the time.—*Trow v. Central R. R. Co.*, *supra*; *Button v. Hudson River R. R. Co.*, 18 N. Y. (4 Smith,) 248; *Harrison v. Berkley*, 1 Strob. 525, 549; *Steamboat Farmer v. McCraw*, *supra*.

It is also a principle belonging to this branch of the law, that although an injury may be occasioned by the defendant's negligence, yet the injured party is entitled to no redress, if by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence. Chitty on Carriers, 273; *Bridge v. Grand Junction R. R. Co.*, 3 M. & W. 244; *Raisin v. Mitchell*, 9 Car. & P. 613 (38 E. C. L. 252); *Butterfield v. Forester*, 11 East, 60; *Barnes v. Cole & Fitzhugh*, 21 Wendell, 188; *Rathbun v. Payne*, 19 Wendell, 399. This principle seems to grow naturally out of the doctrine which denies a recovery where the plaintiff's negligence has contributed to the production of the injurious result; for the law requires the exercise of care and diligence to avoid injury from another's negligence; and it would seem that the omission of such care and diligence would be negligence, contributing proximately to cause the injury.

[4.] The principles which we have announced, lead us to the proposition, that if the negligence of the defendants' schooner was a cause of the disaster, which is the subject of complaint, then the plaintiff had a cause of action, unless the negligence of the plaintiff's servant, who

was drowned, contributed proximately to the production of the injury; or unless those upon the skiff might, by the exercise of proper care and diligence, have prevented the consequences of the negligence on the part of the defendants' vessel. If the plaintiff's servant and another, being in a skiff, fastened it to a snag in the middle of the channel in front of the city of Mobile, where vessels were frequently passing, and fastened it in such a manner that it could not be conveniently and expeditiously loosed, they were guilty of negligence, because they thus placed themselves in a situation of peril from accidents. But if the skiff, being in that situation, was sunk in consequence of the carelessness of a passing vessel, we cannot say that the fault of so placing the skiff was a *proximate* cause of the injury. It may be regarded as a cause; but the connection between it and the result was not so *immediate*, that it could properly be denominated the *proximate* cause.—See *Harrison v. Berkley*, 1 Strob. 525. That it is not a proximate cause, is copiously illustrated by the decisions in analogous cases, to some of which we refer.

Thus, a flat-boat, culpably running at night, which was struck and sunk by a steamboat, was by this court held not to have proximately contributed to the injury.—*Steamboat Farmer v. McCraw*, *supra*. A plaintiff, who left his donkey upon the highway, with feet so fettered as to be unable to get out of the way, notwithstanding that was an illegal act, was permitted to recover for the killing of the donkey, through the negligence of one who was passing along the highway with a wagon.—*Davies v. Mann*, 10 M. & W. 546. Where there was a collision between two boats, and, in consequence of the collision, an anchor fell upon the plaintiff's leg and broke it, it was decided, that neither the fact that the anchor was improperly carried, nor the fact that the plaintiff was where he ought not to have been, relieved the defendant, if the collision was caused by his negligence.—*Greenland v. Chaplin*, 5 Excheq. R. (M., H. & G.) 243. A jury returned a verdict for the plaintiff, whose sloop, being at anchor, was struck by the

defendant's vessel, and announced that there were faults on both sides; and the verdict was allowed to stand, because the plaintiff might be in fault, and yet have a right of recovery.—*Raisin v. Mitchell*, 9 Car. & P. 613. See, also, *Trow v. Central R. R. Co.*, 24 Ver. 488; *Kerwhacker v. C.*, & *C. C. R. R. Co.*, 3 Ohio R. 172; *Cook v. Champlain Transportation Co.*, 1 Denio, 91.

It is extremely difficult, if not impossible, to draw the line which divides proximate from remote causes; and it is, therefore, not unreasonable to find the cases on each side of the line so nearly alike as to be scarcely distinguishable. Nevertheless, the authorities to which we have been referred to show that the placing the skiff in the situation described was a proximate cause of the injury, may be distinguished from this case. In some of them, culpable failure to display a light was evidently regarded as an immediate cause of a collision at night, and as the omission of a duty at the time which contributed to the injury.—*Dowell v. Gen. Nav. Co.*, 5 Ellis & Blackburn, 195; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole & Fitzhugh*, 21 *ib.* 188. In the case of *Button v. Hudson River R. R. Co.*, (18 N. Y. 248,) it appeared that the man, for the killing of whom the action was brought, within six minutes before the arrival of a train of cars, placed himself with his head upon the track on one side, and with his feet upon the other, and, not being seen until it was too late to stop the cars, was killed. The court, in reference to those facts, presuming the deceased to have been in his senses, said, that the deceased must be regarded as having courted his own destruction, and co-operated with the defendants in its production. The distinction between that case and this is too manifest to render comment necessary; and an examination of the decision will show that it fully recognizes the principles which we have announced. Although there may have been a fault in the placing of the skiff in the situation described in the record, yet the plaintiffs may recover, if the defendants' negligence caused the injury, and those who were in the management of the skiff could not

by the exercise of proper diligence, have avoided the consequence of the defendants' negligence.—*Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244.

It follows from what we have said, that the improper placing of the skiff constituted no defense against the liability of the defendant for negligence directly operating to cause the injury; but that if the persons in the skiff could have released it from the snag, and avoided the threatened collision, by the use of reasonable care and diligence, and did not do so, then the defendant is not liable, although the negligence of his vessel may have contributed to the production of the disaster.

We now proceed to test the correctness of the several refusals to charge by the principles above set forth. The second charge requested was properly refused, because, assuming upon the facts stated that those in the skiff could, by the use of proper diligence, have avoided the disaster, it makes the defendants' exemption from liability depend upon the failure to use timely efforts to loose the skiff and get out of the way. The question should have been left to the jury, whether, by the use of proper diligence, those in the skiff could have loosed her and got out of the way. The refusal to give the third charge was proper, because the tendency of the charge was to mislead the jury, by producing the impression, that the placing the skiff as it was placed was, in itself, an act which, for the purposes of this trial, rendered the plaintiff chargeable with negligence. There was no error in the refusal of the fourth and sixth charges requested, for the negligent act mentioned in them was only a remote cause of the injury. The fifth charge requested was in strict accordance with one of the principles which we have laid down in the foregoing opinion, and ought to have been given. The 7th charge as requested is not fully copied into the transcript, and we are unable to pass advisedly upon it. The 9th charge requested was erroneous, because it excludes from the consideration of the jury the question, whether the defendants' vessel was not guilty of negligence, on account of the failure to see

the skiff, and to take steps for avoiding the collision sooner than it did.

The judgment of the court below is reversed, and the cause remanded.

BRAGG vs. MASSIE'S ADM'R.

[DETINUE FOR SLAVES.]

1. *Husband's marital rights in and to wife's personally.*—Prior to the passage of the laws securing to married women their separate estates, the husband's marital rights attached to a slave given to his wife, while unmarried, by her father, unless the terms of the gift secured the property to the separate use of the daughter; and on a subsequent exchange of the slave for another, during the coverture, by and with the assent of the husband, his marital rights equally attached to the slave obtained by the exchange.
2. *Adverse possession between father and daughter living together.*—The possession of a slave by a daughter, under a gift from her father, cannot be considered adverse to the father, or to the estate of her deceased husband, of which her father is the personal representative, when it appears that she is living with her father, that each of them exercises acts of control over the slave, and that the marital rights of her husband attached to the slave during coverture: the possession of father and daughter being joint in such case, and the title being in the father, the possession will also be referred to him.
3. *Private sale by administrator.*—A private sale by an administrator, in his individual capacity, of a slave belonging to his intestate's estate, estops the administrator from afterwards recovering the slave, but does not divest the title of the estate; and if the sale is perfected by delivery, and the administrator afterwards acquires the possession under a new contract with the purchaser, he is estopped from setting up against the latter the illegality of the original sale; consequently, a recovery against him by the purchaser, in an action founded on the subsequent contract, does not bar the title of the estate.
4. *Admissibility of parol to change absolute deed into mortgage.*—Parol evidence is not admissible at law, to show that a deed, absolute on its face, was intended to operate only as a mortgage.
5. *Admissibility of grantor's declarations and acts as affecting gift.*—Where two slaves are given by a father to his two unmarried daughters, by separate gifts made at one and the same time, his declarations at the time, showing a delivery of both slaves, are competent evidence as a

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part of the *res gesta*, in a controversy respecting one of the gifts; and the subsequent acts of both grantor and grantee, showing an assertion of title to the slave by the latter, and the recognition of her title by the former, are also admissible evidence.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by A. R. Davis, as the administrator *de bonis non* of C. C. A. Massie, deceased, against David Bragg, to recover several slaves, together with damages for their detention; and was commenced on the 31st August, 1858. The defendant pleaded "the general issue, in short by consent, with leave to give any special matter in evidence;" and issue was joined on that plea. The material facts of the case, showing the respective titles of the parties, briefly stated, are these: The plaintiff's intestate, in December, 1836, married Ann Eliza Bragg, a daughter of William Bragg, and died in August, 1837. Prior to said marriage, William Bragg had given to his daughter a negro girl named Amy; and after the marriage the girl Amy was exchanged, by agreement between Bragg and his daughter, with the consent and approbation of Massie, for another girl, named Catherine, who, together with her children since born, is sued for in this action. After the death of her husband, Mrs. Massie returned to her father's house, where she continued to reside until 1843, when she married one Ray; and after the lapse of about a year, she again went back to her father's. William Bragg took out letters of administration on the estate of Massie, on the 19th November, 1838; returned an inventory of the property belonging to the estate, in which he included neither Amy nor Catherine, because, as he testified, he thought that Catherine belonged to Mrs. Massie; and resigned the administration on the 28th August, 1858,—the plaintiff being appointed administrator *de bonis non* on the 30th August, 1858. On the 10th June, 1841, while the slave Catherine was in the possession of William Bragg, and while Mrs. Massie was living with him, said Bragg executed

a deed, by which he conveyed said slave, other slaves then in his possession, the plantation on which he resided, and other property, to David Bragg and Wm. H. Knott,—the latter having previously married one of his daughters; and delivered said plantation and slaves to the grantees. This deed was absolute on its face; but the grantor testified, that it was only intended to secure the grantees against their liability as sureties for him, on a debt on which judgment had been recovered against him and them, and which had been taken to the supreme court by appeal; “and the understanding between him and said grantees was, that on his return from Virginia, whither he was about starting for the benefit of his wife’s health, said grantees were to hold his property for him, and help him to work out and pay his debts, when the property conveyed was to be his; but it was understood, also, that said grantees, if he never returned, were to pay all his debts, and divide the balance of his property among his children; and it was understood, also, that the girl Catherine belonged to Mrs. Massie, and that said grantees were to return her whenever Mrs. Massie called for her.” Mrs. Massie was not present when this deed was executed, and had no knowledge of it; and when she afterwards expressed some dissatisfaction with it, “the defendant told her”, as William Bragg testified, “not to be uneasy, as she should have her property.” The case in which the defendant and Knott were sureties for William Bragg having been taken to the supreme court by appeal, and there decided against William Bragg, an execution on the judgment was levied on the slaves now in controversy, with other slaves conveyed by the deed. The slaves were sold under the execution on the 7th March, 1842, and were bought in at the sale by one Shelton, who, on the same day, conveyed them by bill of sale to said defendant and Knott. The slaves were sent back to the plantation of William Bragg, where he and said Knott both resided; and they were divided, in 1847 or 1848, between the defendant and said Knott. William Bragg was not present at the division, but he received from Knott the

slaves which were allotted to the defendant, and retained the possession of them until some time in 1856, when they were recovered from him, in an action of detinue, by the defendant, who had possession of them when this suit was commenced.

On the trial, as appears from the bill of exceptions, the plaintiff introduced William Bragg as a witness, who testified, that his daughter Ann Eliza was seventeen or eighteen years old when she married Massie; that he bought the girl Amy for her, in 1834, from a negro-trader, whose camp was near his house, and, at the same time, bought another girl for his daughter Elmira, who was then unmarried, but afterwards married William H. Knott; that his daughters went to the camp, and each picked out for herself a negro girl, whom he bought for them after they had gone back home. "The defendant here objected to the witness stating anything in relation to any gift to his daughter Elmira, or anything that took place between him and his daughter Elmira, in relation to any negro bought for her, or given to her; but the court overruled the objection, and permitted the witness to state all that took place at the time, as well in reference to the alleged gift to Elmira, as to the alleged gift to Ann Eliza; to which ruling of the court the defendant excepted. The witness thereupon testified, that the two negro girls were sent to his house, and, when near the house, his two daughters being present, he pointed out Amy to Ann Eliza, and said to her, 'There's your negro', and pointed out the other to Elmira, and said to her, 'There's your negro'; to which statement of the witness, so far as it related to the alleged gift to Elmira, the defendant objected, and reserved an exception to the overruling of his objection."

"Said witness further testified, that both of his said daughters continued to reside at his house, and occupied the same room, until Elmira was married to W. H. Knott; that each exercised authority over the negro girl given to her as above stated, as her own, and told her to do anything she wanted done; but he (witness) ruled the house-

hold, his daughters, slaves, and all. The plaintiff asked said witness, 'whose property he called Amy', and 'if he set up any claim or title to the girl Amy after the time of said alleged gift'; to which the witness answered, 'that he called her Ann Eliza's', and 'that he did not set up any claim or title to her.' The defendant objected to each of these questions, and to the answers to them, and excepted to the overruling of his objections. The plaintiff also asked said witness, 'whether Ann Eliza claimed the girl Amy, in his presence, [prior] to her marriage, and in what way she claimed her'; to which the witness replied, 'Yes, by doing what she wanted with her, and by saying the girl was her own'. The defendant objected to this question and answer separately, and excepted to the overruling of his objections by the court. The plaintiff then asked said witness, 'Did you, or not, when she claimed said negro in your presence, ever dispute it'? to which the witness answered, 'that he never did.' To this question and answer, also, objections were interposed by the defendant, and exceptions reserved to the overruling of his objections."

Bragg further testified, on cross-examination, that Amy was only five or six years old when he bought her and gave her to his daughter Ann Eliza; "that she was too small to do anything, and just knocked about the house and yard like any of the other little negroes, and did anything that any of the family told her to do"; that his daughter claimed her, "but he was unable to state any particular time or times when she did so, or any particular thing that she said or did in that respect"; also, that after the exchange of Amy for Catherine, as above stated, and after Massie's death, Mrs. Massie had possession of Catherine, at his house, until the slave was recovered from him in the action of detinue by the defendant; that she had possession at the time he conveyed the slave to the defendant and Knott; that Mrs. Massie was not present when the deed was made, and knew nothing about it; that he made the deed "because he thought there would be some trouble, and no consideration was paid for it"; that he always paid taxes on

both Amy and Catherine, and that the money paid to Shelton for the slaves, on his purchase of them at the sheriff's sale, was a part of the proceeds of the crops raised by him on the plantation conveyed to the defendant and Knott.

The court charged the jury, at the request of plaintiff:

"1. That, if they believed, from the evidence, that William Bragg gave the girl Amy to his daughter Ann Eliza; and that Ann Eliza afterwards, in 1837, married said Massie; and that said Bragg, after said marriage, and during the life-time of said Massie, exchanged the girl Amy for Catherine; and that said Massie recognized the trade, and made no objection to it,—then the title to Catherine vested in said Massie; and that if said Bragg, in 1841, while he was the administrator of said Massie, sold the said girl to the defendant and Knott, without any order of court, or authority by will, such sale did not divest the right and title of said Massie's estate.

"2. That although they might believe, from the evidence, that said slave was in the possession of Mrs. Massie, and claimed by her as her own property, when the sale was made by William Bragg to the defendant and Knott, in 1841; yet, if they further believe that said Bragg was then the administrator of Massie, and that he sold said slave without authority of law, and placed her in the possession of the defendant and said Knott, and that she remained in their possession, and under their control, until the sale by the sheriff in 1842, the said sale did not divest the title of Massie's estate, if he had reduced said slave into his possession during his life-time.

"3. That, although delivery is necessary to perfect a parol gift of a slave, yet it is not necessary that the actual possession should be retained by the donee; that the subsequent possession by the father is not necessarily incompatible with the donee's right to the slave, nor is it conclusive evidence that there was no delivery, or that the property did not pass to the donee, his daughter; and that where the donee is the daughter, and lives with the donor as a member of his family, and the slave is too young to be

a source of profit, or to do active service, these facts are, *prima facie*, sufficient to explain the donor's subsequent possession.

"4. That when a gift has been once made, by a father to his child, the father cannot, of his own accord, deprive the child of it: being once a gift, it is always a gift, and the father cannot again become the owner of it without the consent of the child.

"5. That by the common law, marriage vests in the husband all the wife's personal property in possession at the time of the marriage, or that she may acquire and reduce to possession during the coverture; and that if personal property is given or sold to the wife during the coverture, prior to the 1st March, 1848, without any words creating a separate estate, and passes into the possession of the husband, then his marital rights attach, and the title vests in him; and that if it once passes into his possession, and the title vests in him as husband, and he dies, the title to it devolves upon his administrator, although his wife may claim it as hers.

"6. If the jury believe, from the evidence, that the girl Catherine was, in law, the property of Massie at the time of his death, in 1837; and that William Bragg, in 1841, while he was the administrator of Massie's estate, sold and conveyed said slave to the defendant and Knott; and that afterwards, in 1847 or 1848, a division of the property so conveyed to them was made between Knott and the defendant; and that the girl Catherine, with others, was then allotted to the defendant; and that he sent her, or permitted her to go, to the house or premises of William Bragg; and that Bragg held her as the bailee of the defendant; then, the subsequent judgment and recovery by the defendant against William Bragg, in 1856, would constitute no bar to any right of the plaintiff, as administrator *de bonis non*, to recover the property sued for in this action.

"7. If the jury believe, from the evidence, that the girl Catherine was the property of Massie at the time of his death, in 1837; and that William Bragg was appointed

and qualified as his administrator in 1838, and, in 1841, while he was such administrator, bargained, sold, and conveyed her by deed, to the defendant and Knott; and that said Bragg continued to be the administrator of said Massie's estate until August, 1858; then, neither the deed and conveyance by said Bragg in 1841, nor the judgment recovered by the defendant against said Bragg in 1856, nor the sale by the sheriff in 1842, nor any subsequent division of the slaves between the said Bragg and the defendant, or between them and Knott, affect or divest the plaintiff's title as administrator *de bonis non* of said Massie, or constitute a bar to his right to recover in this case.

"8. If the jury believe, from the evidence, that William Bragg was the administrator of said Massie in 1841, and, whilst he was such administrator, sold and conveyed the girl Catherine, by the deed which was in evidence, to the defendant and Knott; and that when said Bragg and his daughter, a few days afterwards, went to Virginia, the girl Catherine and the other slaves were taken into the possession and control of Knott, for Bragg and himself; and that they afterwards, in 1842, delivered the girl Catherine to the sheriff, to be sold by him as their property; and that Shelton bought said girl at the sale for them, and they took from him a bill of sale for her; and that she was taken back into the possession of said Knott and Bragg, or either of them; and that afterwards, in 1848, said Knott and Bragg divided the slaves between themselves; and that the girl Catherine, with others allotted to David Bragg on said division, was placed by him, or permitted to go, into the possession of William Bragg; then, said William Bragg could not defend or defeat any action by said defendant for said negroes, and the plaintiff in this action, as the administrator *de bonis non* of said Massie, is not barred of his right of action, either by any record of a former recovery offered in evidence, or by the lapse of time, or by the statute of limitations.

"9. If the jury believe, from the evidence, that the defendant and Knott, or either of them, took possession of

the slaves conveyed to them by William Bragg, under said deed, in 1841, then the said sale and conveyance was not the sale of a chose in action; or, if they believe that the negroes conveyed by said deed were left on the premises by said William Bragg and his daughter, when they went to Virginia in 1841, under the control of said Knott and the defendant, or either of them; and that they, or either of them, continued in possession of said slaves until they were sold by the sheriff in March, 1842; then, the sale and conveyance by said deed in 1841 was not the sale of a chose in action, nor is the plaintiff, as administrator *de bonis non* of said Massie, thereby barred of his right of action in this case.

“10. If the jury believe, from the evidence, that William Bragg, in 1856, when David Bragg sued him in detinue for the slaves now in controversy, was holding said slaves as the bailee of David Bragg, or by his permission, then the said William Bragg could not defend or defeat that action, by showing that said sale and conveyance by himself to David Bragg and Knott was illegal and unauthorized; and the judgment and recovery in that action is no bar to the plaintiff's right of action in this case; and that the jury may look to all the facts and circumstances in the case, to determine whether or not said William Bragg was then holding said negroes as the bailee of David Bragg, or by his permission.

“11. If the jury believe, from the evidence, that said William Bragg, in 1834, bought the girl Amy and another, and brought or sent them to his house, and then and there called up his two daughters, and said to Ann Eliza, ‘That’s your negro,’ pointing to Amy, or calling her by name, and to Elmira, ‘That’s yours,’ pointing to the other; and that from and after that time, and until her marriage with Massie, Ann Eliza always claimed Amy as her property, in the presence of William Bragg; and that he never disputed her claim to Amy; and that afterwards, in 1837, before the death of said Massie, William Bragg bought the girl Catherine, and exchanged her for Amy; and that Catherine

went into the possession of Massie and wife, and remained in their possession until the death of Massie, and nursed his infant child after his death,—these are all circumstances to which the jury may look, in order to determine whether or not there was an actual delivery of said slave.”

The defendant excepted to each of these charges, and then requested the court to give the following:—

“ 1. If the jury believe, from the evidence, that Mrs. Massie, after the death of her husband, and at the time William Bragg was appointed administrator of said Massie's estate, held the slave Catherine as her own, claiming her as her own property ; and that she, and those holding for her, continued to hold the slave for six years ; and that William Bragg knew that she and those holding for her did so hold and claim said slave, and never took or had possession of said property as administrator of said Massie, nor set up any claim to her as such administrator ; then, his title as administrator, and the title of the estate which he represented, to said slave, was barred after the expiration of six years from the time of his appointment as such administrator, and the plaintiff cannot recover in this suit.

“ 2. If the jury believe, from the evidence, that after William Bragg's appointment as administrator of Massie's estate, and while he was such administrator, the slave Catherine was in the possession of Mrs. Massie, who held and claimed said slave at the time William Bragg executed the conveyance to David Bragg and Knott ; and that six years had elapsed, from the time of such holding by Mrs. Massie, to the commencement of this suit,—the plaintiff cannot recover, notwithstanding the sale by William Bragg to the defendant and Knott and their subsequent possession of the slave.

“ 3. If the jury believe, from the evidence, that the slave Catherine, at the time of the sale by William Bragg to the defendant and Knott, was in the possession of Mrs. Massie, and was held and claimed by her as her own property ; and that this was known to the said William Bragg, who was then the administrator of said Massie ; and that

the defendant and Knott did not know that said slave was the property of said estate,—such sale and conveyance passed the title to said slave to the defendant and Knott, and the plaintiff cannot recover in this action, although the title to said slave was in Massie's estate at the time of said sale.

“4. If the jury believe, from the evidence, that said William Bragg was the administrator of Massie's estate at the time he sold the slave to the defendant and Knott; and that said girl was then in the possession of Mrs. Massie, who was claiming her *bona fide* as her own; and that this was known to William Bragg,—then said Bragg, as such administrator, only had a right of action in said slave, which he could sell; and the sale and conveyance of the slave by him to the defendant and Knott passed the title to them, as between him and them; and the plaintiff cannot recover in this suit, unless the jury believe, from the evidence, that the defendant and Knott colluded with William Bragg to commit a fraud on the estate of Massie, or participated with him in the commission of a *devastavit* of said estate.

“5. If the jury believe, from the evidence, that said William Bragg was the administrator of Massie's estate at the time he sold and conveyed the girl Catherine to the defendant and Knott; and that said girl was then in the possession of Mrs. Massie, who was claiming her *bona fide* as her own; and that this was known to said William Bragg; then, said Bragg, as such administrator, had a right of action, which he could sell; that the sale and conveyance by him to the defendant and Knott passed the title to the slave Catherine to them, as between him and them and the plaintiff in this action; and that the plaintiff cannot recover in this suit, if the defendant and Knott were ignorant of the fact that the title to the slave was in Massie's estate.

“6. If the jury believe, from the evidence, that Mrs. Massie had the adverse possession of the slave Catherine at the time of the sale by William Bragg to the defendant and Knott, and that this was known to said William Bragg,

such sale and conveyance, although void as to Mrs. Massie, was good as between William Bragg and the defendant; and that the plaintiff cannot recover in this action, unless such sale was a contrivance between the defendant and William Bragg, to enable the latter to commit a *devastavit* on the estate of Massie, and a collusion between them to commit a fraud on said estate.

"7. If the jury believe, from the evidence, that the girl Catherine, and the others sued for in this action, are the same slaves that were sued for and recovered by the defendant, in the action of detinue brought by him against William Bragg; and that the said William Bragg, at the commencement of that action and the rendition of said judgment, was the administrator of said Massie's estate; and that the plaintiff in this action has no other or different title to said slaves, than such as was at that time in the estate of said Massie, or in his representative, he cannot recover in this action.

"8. If the jury believe, from the evidence, that the conveyance by William Bragg to David Bragg and Knott was intended by the parties to be or operate as a mortgage, to secure said David Bragg and Knott, or as a conditional sale, to be void, and the slaves to be restored to William Bragg, upon his paying or refunding to David Bragg and Knott the money which they paid as sureties for him; and that William Bragg has paid or refunded said money; and that David Bragg continued in the possession of said Catherine, claiming her as his own property, for more than six years from the time of such payment, to the commencement of this suit; and that this was known to William Bragg, who was, at the time of such payment, the administrator of Massie's estate,—the plaintiff cannot recover.

"9. If the jury believe, from the evidence, that the conveyance by William Bragg to David Bragg and Knott (?) as the sureties of William Bragg, or as a conditional sale, to be void, and the negroes to be restored to William Bragg, upon his paying or refunding to David Bragg and Knott the money which they should pay as sureties for him; and

that all the money paid or advanced by them was paid or refunded to them before the year 1848; and that the negroes allotted to David Bragg, on the division between him and Knott of the slaves so conveyed to them, went into the possession of William Bragg in 1848, and were held by him, either as his own property, or as the property of Mrs. Massie, from that time until the commencement of said detinue suit against him by David Bragg; and that the slaves sued for in this action are part of the same slaves sued for in that action; and that the said William Bragg, at the time of the commencement of that action and the rendition of judgment therein, was the administrator of said Massie's estate; and that the plaintiff in this action has no other or different title to the slaves sued for, than such as was at that time in the estate of Massie, or in his representative,—the plaintiff cannot recover."

The court refused each one of these charges, and the defendant excepted to their refusal; and he now assigns as error the several charges given, the refusal of the several charges asked, and the rulings of the court on the evidence to which, as above stated, he reserved exceptions.

S. F. HALE, and THOS. H. HERNDON, for appellant.

WM. P. WEBB, with BROOKS & GARROTT, *contra*.

STONE, J.—In the questions which are pressed upon our consideration, no contest is raised as to the validity of the gift, by William Bragg to his daughter, Mrs. Massie, of the slave Amy; nor of the subsequent exchange of the slave Catherine for Amy. The jury, by their verdict, impliedly affirmed that such gift was made and perfected; and the questions bearing on the merits of this case, which we are called upon to decide, all rest on the postulate that the gift was completely consummated. On any other hypothesis, the plaintiff's intestate never had title, and the present suit would have failed on that ground; while, on the other hand, the defendant's title would be unquestioned, both by his purchase from William Bragg, and by

his recovery of the identical property in controversy in this suit, in an action of detinue brought by him against William Bragg. Hence, in considering the questions raised by the charges given and refused, we will regard it as conceded that, at the time of the intermarriage of Ann Eliza with Mr. Massie, she was the owner of the slave Amy, and that subsequently, during the time of her coverture, she, with the approbation of her husband, exchanged Amy for the girl Catherine.

The uncontroverted, leading facts of this case, then, are the following: Ann Eliza Bragg was the owner of the slave Amy, and lived with her father, William Bragg, where the slave also lived. She intermarried with Mr. Massie, plaintiff's intestate, with whom she lived, also at the house of her father, until the death of her husband, which took place only a few months after the marriage. During the life-time of Mr. Massie, Mrs. Massie, in his presence, and with his approbation, exchanged with her father the slave Amy for the slave Catherine. Mr. Massie died in the summer or fall of 1837, intestate. William Bragg was appointed administrator of the estate of Mr. Massie, in November, 1838, and returned an inventory of his effects, omitting all mention of the slave Catherine. William Bragg continued administrator of the estate of Mr. Massie, until August, 1858, when he resigned, and Mr. Davis, the present plaintiff, was appointed administrator *de bonis non*. Mrs. Massie continued to live with her father, William Bragg, except for about one year, which was after her second marriage in 1844. In 1841, between two and three years after he was appointed administrator of Mr. Massie, William Bragg, by private contract, and in his own right, conveyed his property, including the slave Catherine, by deed absolute on its face, to David Bragg and William H. Knott, who thereupon took possession and control of the property, and worked it until about the year 1848; William Bragg and his daughter, Mrs. Massie, returning to the place some few months after the sale, and living upon it with Mr. Knott, who was son-in-law to William Bragg.

In 1842, Catherine was sold at sheriff's sale, as the property of David Bragg and Knott, to satisfy an execution which was the proper debt of William Bragg; was bought in for the benefit of David Bragg and Knott, and returned to the plantation from which she had been taken, namely, the plantation conveyed by William Bragg to David Bragg and Knott. About the year 1848, David Bragg and Knott made a division of the slaves which had been conveyed to them by William Bragg, and the slave Catherine was allotted to David Bragg. Immediately after this division, David Bragg sent the slaves which had been allotted to him, to the place occupied by William Bragg, and they continued with him until 1856, when David Bragg recovered them from him in an action of detinue. There was some proof tending to show that the deed from William Bragg to David Bragg, though absolute on its face, was intended and understood as only a mortgage security. There was proof, also, tending to show that William Bragg conveyed the slave Catherine as above stated, in ignorance of any claim which the estate of Mr. Massie had to him; believing at the time that she was the property of Mrs. Massie. There was some proof, also, tending to show that Mrs. Massie, when informed that Catherine had been deeded away, was dissatisfied; and that David Bragg informed her that Catherine should go back to her.

[1.] We may state, further, that we do not understand the counsel as controverting the proposition, that when Ann Eliza intermarried with Mr. Massie, the slave Amy became his property; and that when the exchange of slaves was made, the slave Catherine also became his property. In fact, these seem to be self-evident propositions, there being no evidence in this record that Mr. Massie renounced his marital rights.—*Machen v. Machen*, 15 Ala. 373; *Thrasher v. Ingram*, 32 Ala. 645; *Machen v. Machen*, 28 Ala. 374; *Bell's Adm'r v. Bell*, 37 Ala. 536.

Waiving then, for the present, all question of the consummation of the gift, we will address ourselves to certain points which have been pressed upon our attention as

grounds of reversal in this case. The appellant makes the following points :

1. That Mrs. Massie held the slave Catherine adversely to her father, the representative of her husband's estate ; that the interest of the estate in the slave Catherine was, therefore, a mere chose in action, which the administrator had a right to sell at private sale ; and that such private sale vested the title in David Bragg and William Knott, the purchasers.

2. That Mrs. Massie held the slave adversely to her father ; that she, and those holding under her, have had the uninterrupted adverse possession for more than six years after William Bragg was appointed administrator ; and that, on this account, the claim of the estate is barred.

3. That, conceding the private sale by William Bragg to David Bragg and Mr. Knott to have been illegal, (that being the only theory on which this suit is maintainable,) the sale, under our law, was simply void ; that being void, when the action of detinue was brought by David Bragg against William Bragg, the latter was not estopped by his sale from resting his defense on the invalidity of the contract ; that William Bragg could and should have defended his possession on the title of his intestate, and that the recovery in that action is conclusive against the title of Mr. Massie's estate.

4. That the deed from William Bragg to David Bragg and Mr. Knott was only a mortgage to secure the payment of a debt ; that the debt had been extinguished ; and therefore, William Bragg, by suffering the former recovery, estopped the estate from recovering the property.

[2.] In this case, there is no evidence that Mrs. Massie held adversely to her father, William Bragg. The father and daughter lived together, and each exercised some control over the slave. Looking alone to the question of control and dominion, the possession would be pronounced a joint possession. Neither was holding adversely to the other, in that sense which could ripen into a title by mere force of the possession. As conclusive evidence of this

fact, we find that the father, while the joint possession continued, sold the slave, and delivered the possession to another. This shows that his claim was not a chose in action, and relieves us from the consideration of the question, whether, if Mrs. Massie had been holding the slave adversely, the administrator could have made a valid private sale to a third person.—See *Woolfork v. Sullivan*, 23 Ala. 548; *Bogan v. Camp*, 30 Ala. 276. The case is clearly within the principle which holds, that where two persons are in the joint possession of property, the title being in one, the law will refer the possession to him who has the title.—*Governor v. Campbell*, 17 Ala. 366; *McCoy v. Odom*, 20 Ala. 502; *Michan v. Wyatt*, 21 Ala. 813.

[3.] The sale by William Bragg was a private sale by an administrator, of a slave, the property of his intestate's estate; and under the principle settled in *Pistole v. Street*, (5 Porter, 64,) the title to the property did not pass out of the estate; but William Bragg estopped himself from recovering the property from his vendee.—*Fambro v. Gantt*, 12 Ala. 304; *Lay v. Lawson*, 23 Ala. 377; *Weir v. Davis*, 4 Ala. 444.

What we have said above disposes of the first and second points made in argument by appellants. Mrs. Massie never had the adverse possession.

A full answer to the third point made in argument for the appellant, is furnished in the fact, that the sale by William Bragg to David Bragg and William Knott, was not executory, but executed. It was perfected by delivery; and Messrs. David Bragg and Knott took and retained possession under their purchase. Having subsequently acquired the possession from David Bragg, William Bragg was as much estopped from relying on the invalidity of the sale made by himself, as if he himself had been plaintiff suing for the property. The case is not within the principle settled in *Fambro v. Gantt*, *supra*, or in *Gunter v. Leckey*, 30 Ala. 591. The recovery in the action of detinue by David Bragg against William Bragg, is no bar to the present suit; for the title here relied on could not have been litigated in that suit.

[4.] The fourth point we must also decide against the appellant. In a suit at law, it is not permissible to vary, by parol proof, the terms of a deed absolute on its face, so as to make it operative only as a mortgage security.—*Jones v. Trawick*, 31 Ala. 256; *Parish v. Gates*, 29 Ala. 261, and authorities cited.

Tested by the principles above declared, we hold, that the circuit court committed no error available to appellant, either in the charges given, or in the charges refused. Those given correspond substantially with the views we have expressed. Of those refused, the 1st, 4th and 6th, are abstract. The rest do not assert correct legal propositions, and were properly refused.

[5.] What was said by the witness William Bragg, in reference to the gift of a slave to his daughter Elmira, related to an act contemporaneous with the alleged gift to Ann Eliza, was part of the *res gestæ*, and was harmless in its character; and we perceive no error in permitting the witness to speak of it. He was testifying of what he had said at the particular time, and this was given by him as a part of the conversation. This, together with certain answers of the witness as to the possession and recognized ownership of the negro girl, before the marriage of Mrs. Massie, all tended to shed light on the question of gift *vel non*, which was a material and controverted question on the trial in the circuit court.

We are not able to perceive any relevancy to the issue in this cause, of the fact sought to be proved, that the defendant (David Bragg) held a note against William Massie, which had been presented to William Bragg, the administrator, and not paid. Nor do we perceive any error in the court's ruling, which allowed the witness to state the reasons why he paid taxes on the slave Amy, after the gift, and while Ann Eliza was a minor living in his family.

We find no error in the various rulings of the circuit court, and its judgment is consequently affirmed.

COSTLY vs. TARVER.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *General charge on evidence.*—Where the bill of exceptions purports to set out all the evidence, and does not show that any proof was made of the defendant's possession of the premises sued for, a general charge to the jury, instructing them to find for the plaintiff if they believed the evidence, is erroneous.
2. *Sale of decedent's real estate, for division ; title to lands allotted as widow's dower.*—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among the heirs, and the lands in which the widow's dower has been allotted are included in the order and sale, the title to such lands, and the right to the possession on the death of the widow, vest in the purchaser ; but, if such lands are not included in the order and sale, the title descends to the heirs, with the right to the possession on the death of the widow.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Hezekiah Tarver and others, as heirs-at-law of Wells Tarver, deceased, to recover the possession of a town-lot in LaFayette, together with damages for its detention. The premises in controversy embraced the dwelling-house of the decedent, and were allotted to the widow as her dower, by commissioners appointed by the probate court, on the 13th March, 1848 ; and it was shown that the widow was dead when the suit was commenced. The defendant seems to have derived title under an order of the probate court, made on the 13th March, 1848, authorizing the sale of the decedent's real estate for the purpose of making an equitable division among the heirs ; a sale by the administrator, pursuant to the order, and a conveyance to the purchaser, who subsequently conveyed to the defendant's vendor. The bill of exceptions purports to set out all the evidence adduced on the trial, and states that there was no conflict in the evi-

dence. The court charged the jury, that they must find for the plaintiffs, if they believed the evidence; to which charge the defendant excepted, and he now assigns the same as error.

RICHARDS & FALKNER, for appellant.

C. D. HUDSON, *contra*.

R. W. WALKER, J.—The bill of exceptions purports to set out all the evidence that was offered on the trial; and the charge of the court was, that if the jury believed the evidence, they must find for the plaintiffs. There was no proof, so far as the record discloses, that the defendant was in the possession of the land sued for at the date of the issuance of the writ; and as, without such proof, the plaintiffs were not entitled to a recovery, it follows that the judgment must be reversed, for this reason, if for no other.

We have been furnished with no brief by the counsel for the appellee; and cannot tell whether any question was made in the court below, or was intended to be raised here, as to the validity of the sale made by the administrator under the order of the probate court. Under these circumstances, we have not thought it necessary to examine the proceedings of the probate court, with the view of ascertaining whether there is any well-founded objection to the validity of the sale made under its order.

[2.] It seems to be assumed by the counsel for the appellant, that the order of sale, and the deed of the administrator to the purchaser, embraced the land allotted to the widow as her dower. If this be true, and there be no sufficient objection to the validity of the sale, then we concur in the conclusion, that although the widow during her life had a paramount right to the possession of the land allotted as her dower, yet, on her death, the purchaser at the administrator's sale, and not the heirs of the intestate, became entitled to it. The statutory power of an administrator to sell the real estate of his intestate, under an order

of the probate court, embraces whatever is descendible to the heirs.—*Pettit v. Pettit*, 32 Ala. 288. On the death of the intestate, the law casts the freehold on the heir, subject to the widow's claim of dower; and on the death of the widow, the heir takes, as part of the inheritance, what had been assigned for her enjoyment during her life. Consequently, where the entire real estate of the intestate has been sold by order of the probate court, subject to the widow's dower, the purchaser at such sale becomes entitled, on the death of the widow, to the possession of the land assigned as her dower.

In the present case, the order of sale is broad enough to cover the entire real estate of the intestate. But the question is, whether the sale, as made by the administrator, was of the entire real estate, subject to the widow's dower interest, or whether the land set apart for her dower, and not not simply her right of dower therein, was excepted from the operation of the sale. The sale, as reported by the administrator, was of "the real estate of the said Wells Tarver, deceased, (*except the widow's dower,*) as described in the petition for sale," &c.; and if we look alone to this report, as showing the extent of the sale, these words of exception might possibly be construed as simply embracing the widow's right of dower, and not the land set apart to her. But, when we come to examine the deed of the administrator to the purchaser at the sale, we find reason to suppose that the sale was not intended to include the land assigned as the widow's dower. On this subject there is some obscurity, growing out of the confused description of the lands in the various petitions, orders, and deeds, which can doubtless be removed on another trial.

The widow's petition for dower, and the administrator's petition for an order of sale, both alleged that the intestate was seized of "Lot No. 17, in letter A, it being the north-west corner of said lot (No. 17), fronting two hundred feet on Franklin street, running back east, adjoining lot No. 18, two hundred and fifteen feet, situated in the town of Lafayette, and the same being a part of the north-west quarter of

section thirteen, township twenty-two, range twenty-six, being the premises where the said Wells Tarver resided at the time of his death; * * * * * also, lot No. 17, in letter A, on Franklin street, front one hundred and eleven feet, running back the length of said lot in the town of Lafayette." The land allotted to the widow as her dower, is described in the record as "one hundred and six feet in front on Franklin street, and running back sixty-three feet, including the dwelling-house and well, it being a part of lot No. 17; in the town of Lafayette." It would seem probable, though, in the absence of any further evidence as to the locality, we cannot be positive as to this, that the land thus set apart for the widow's dower, was carved out of the lot first named in the petition, and there described as the north-west corner of lot No. 17, and was entirely distinct from the other lot No. 17 named in the petition, and described as having a "front of one hundred and eleven feet, and running back the length of said lot." If, in point of fact, this last lot was entirely distinct from the one out of which the widow's dower was carved, then it would seem from the deed executed by the administrator, under which the defendant claims, that the sale made by the administrator included only the lot last named in the petition, and did not embrace the land set apart for the widow's dower; for the deed of the administrator describes the land sold by him as "lot No. 17, in letter A, situate in the town of Lafayette and county aforesaid, said lot fronting one hundred and eleven feet on Franklin street, and running back the length of said lot," which exactly corresponds with the description of the lot above referred to, as the one last named in the petition. On the supposition that this was the only lot sold by the administrator, and that the dower of the widow was carved out of another and a different lot, it is obvious that, as against the heirs of the intestate, persons claiming under the purchase at the administrator's sale would have no title, on the death of the widow, to the land allotted as her dower. The uncertainty on this subject can doubtless be

removed on another trial. What we have said will suffice to indicate the principle which controls the case.

Judgment reversed, and cause remanded.

BLACK vs. BLACK.

[BILL IN EQUITY FOR PARTITION OF SLAVES.]

1. *Motion to suppress deposition on account of witness' failure to answer question.*—A deposition will not be suppressed, on the ground that the witness has failed to answer a cross-interrogatory, or that his answer is evasive, because, in answering the interrogatory, he only says that he refers to his answers to the direct interrogatories as containing all his knowledge on the subject.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Gideon Black and others, children of Thomas and Mertila Black, against said Thomas Black and others, asking a partition of certain slaves, in which the complainants claimed a remainder, after the death of their mother, under a deed of gift from their maternal grand-father, Thomas Leverett; also, the appointment of a receiver to take charge of the slaves, and an injunction against several creditors who had attached and levied on some of them. Thomas Black answered the bill, denying the alleged gift, and asserting his marital rights to the slaves; and he also filed a cross-bill, for the purpose of having the complainants' deed cancelled. The chancellor dismissed the cross-bill, and, on final hearing on pleadings and proof, rendered a decree for the complainants. The appeal is sued out by Thomas Black, who assigns as error the dismissal of his cross-bill, the final decree on the merits, and the rulings of the chancellor on numerous exceptions to evidence.

CHILTON & YANCEY, for appellant.

GEO. W. GUNN, and J. FALKNER, *contra*.

A. J. WALKER, C. J.—The motion to suppress the deposition of Gideon Leverett was made upon the ground of his failure to answer a question propounded by the appellant. The question is as follows: "If you say a deed was executed, tell everything that was done, so that the court may know what you mean when you say, a deed was executed." To this the witness answers, as appears from the transcript: "I refer to my answers made to the direct interrogatories what know deed of trust or gift, and I hope the court will understand what I mean or know about it." It is evident that there is some imperfection in taking down the answer of the witness; but we think it may fairly be understood as referring to the answers to the direct interrogatories for such knowledge responsive to the question as he had. On looking to the answers to the interrogatories, we find a statement of many things pertaining to the execution of the deed; and those things, the answer in question, fairly interpreted, says, constituted the sum of his knowledge on the subject. We do not feel authorized to pronounce the answer so evasive, that the deposition ought to be suppressed; and although it may be inconvenient, sometimes, for a witness to refer to some other part of a deposition for his answer to a question, that is not a fatal objection. Indeed, it is an established practice, to refuse to suppress a deposition on account of a failure to answer a question, if the facts sought to be elicited can be ascertained from other parts of the deposition, or are immaterial. *Spence v. Mitchell*, 9 Ala. 744; *Gibson v. Goldthwaite*, 7 Ala. 281; *Buckley v. Cunningham*, 34 Ala. 69. We decide, that there was no error in overruling the motion to suppress the deposition.

We entertain no doubt that the rulings of the chancellor upon the different exceptions to evidence, so far as they could possibly influence the result of this case, were correct. It is not necessary that we should go into an examination of them.

The basis, upon which the complainants' equity rests, is, that the title to a certain negro woman was by deed vested in trustees, for the separate use of the complainants' mother during her life-time, with a remainder over, freed from the trust, to her children. The appellant alone assails this feature of the bill, and he alone appeals, and assigns error. Conceding for the purpose of our argument that the appellant's answer has the effect of casting the burden upon the complainants of sustaining the allegations of their bill by two witnesses, or by one with corroborating circumstances, we must, nevertheless, decide that the bill is sustained by the testimony. The credibility of the complainants' most material witness, Gideon Leverett, is assailed upon the ground that its different parts are conflicting; that it conflicts with an affidavit, at one time made by the witness, as to the date of the deed, and that it contains statements inconsistent with the testimony of two other witnesses. Whatever confusion, or conflict, may exist, is as to dates; and we do not deem that a very strong objection to the credibility of the witness, speaking, as he did, of events which transpired more than thirty years before. There is no conflict between the different parts of the deposition, nor between the deposition and the bill, as to the contents of the deed. The answer to the third interrogatory does state, that the deed was made to trustees "for the benefit of Mertila Black, for and during her natural life-time, and then the trust to cease, and the said negro girl (Critt, or Critty) and her increase to go to the children of said Mertila Black"; while the copy of the deed, as proved in the deposition and alleged in the bill, shows that the conveyance was "*for the sole and exclusive use, benefit and advantage of Mertila Black,*" and at her death the trust estate to cease, and the negro girl to vest (in the language of the deed) "in the children of Mertila Black now in being, or which may hereafter be born." The conflict apparent from this presentation of the answer to the third interrogatory and of the copy of the deed, vanishes when we turn to the interrogatory, and find that it does not question the witness

as to the contents of the deed, but asks him to whom, and for whose benefit, the deed was made. The answer simply responds to the question; and the response is not inconsistent with the contents of the deed, when it is construed in reference to the question.

What is said by this witness, as to his father going to Upson county, to deliver the deed, is made harmonious with the rest of the deposition, by understanding the witness to speak of delivery in its very common acceptation of giving manual possession of it.

The witnesses who, it is contended, controvert some of the statements of this witness, are themselves not in a position entirely above suspicion; and as this witness, Gideon Leverett, is sustained by other witnesses as to the most material facts stated by him, we regard him as entitled to our credence, notwithstanding what those other witnesses may have said. The depositions of Abram Leverett, J. J. Holly, William Page, Henry Pruitt, Joseph Pruitt, and Leroy Gresham, strongly fortify and corroborate the testimony of Gideon Leverett. The testimony of Holly proves the admission by the appellant of the deed, that it was lost, and had been established as a lost deed in the superior court of Troup county, Georgia; and the record from the superior court of Troup county, Georgia, shows that the deed there established was the same with the copy proved by the complainants' witness, Gideon Leverett. Other corroborations, quite as strong, might be drawn from the testimony of the other witnesses; but it is unnecessary for us to farther amplify. Every fact necessary to sustain the title of the complainants, and to show the defendant's want of title, was fully made out by two witnesses, or by one with strong corroborating circumstances. The appellant had no interest whatever in the property, upon which he could either defend the original bill, or sustain his cross-bill. There was, therefore, no error of which he can complain.

Affirmed.

WILLIAMS vs. AVERY.

[BILL IN EQUITY TO PROTECT WIFE'S SEPARATE ESTATE AGAINST JUDGMENT CREDITORS OF HUSBAND.]

1. *What words will create separate estate in wife.*—A conveyance of a slave "to R. W., wife of W. W., and her bodily heirs, to their exclusive use, benefit, and behoof," creates a separate estate in R. W., to the exclusion of the marital rights of her husband.
2. *Husband's marital rights; possession between tenants in common.*—The possession of one tenant in common being the possession of both, the husband's marital rights attach to slaves which are in the possession of a person who is a tenant in common with his wife.
3. *Validity of voluntary conveyance as against creditors.*—A voluntary conveyance by a husband to his wife, if free from fraud, actual or constructive, will sometimes be upheld in equity, as against subsequent creditors of the husband; but proof of an intent to hinder and defraud his creditors, will avoid the deed, and render the property subject to subsequent debts.

APPEAL from the Chancery Court of Randolph.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by Mrs. Ruth Williams, suing by her next friend, against her husband, William Williams, B. B. Avery, W. F. Meador, and J. J. Meador; and sought to protect the complainant's interest in a slave named Nancy, which she claimed as her separate estate, and to enjoin the sale of said slave under executions against her husband. The complainant's title to the slave, as stated in the bill, was founded on an alleged gift from her mother, Mrs. Mary Sunday, by which a slave named Ruth, with her future increase, was conveyed to the complainant and her sister, Mrs. Rebecca McCreary, free from the debts, contracts, and liabilities of their respective husbands; a subsequent division of the slaves, in 1845, by agreement, between the two sisters, when a boy by the name of Pickens was allotted to the complainant; a sale of the boy Pickens by her husband, at her request, and the investment of the proceeds of sale in the purchase of the woman

Nancy. At the time of the division of the slaves between the complainant and her sister, McCreary and wife executed to Mrs. Williams a relinquishment of all their title to the boy Pickens ; and after the purchase of the woman Nancy, Mrs. Williams procured from the vendor a bill of sale conveying said slave to her. A decree *pro confesso* was entered against William Williams. The other defendants filed answers, denying all the material allegations of the bill, and insisting that the slave was subject to their executions. On final hearing, on pleadings and proof, the chancellor dismissed the bill, at the costs of the complainant's next friend ; and his decree is now assigned as error.

RICHARDS & FALKNER, for appellant.

JNO. T. HEFLIN, *contra*.

STONE, J.—We think the testimony of the witnesses Reaves and McCreary fully establishes the fact, that the copy-deed attached to their depositions is a substantial copy of the title to the slave Pickens, as the same was executed by McCreary and wife to Mrs. Williams. But we do not concur with the solicitor of appellee, in the opinion that, under that deed, the title vested in Mr. Williams, the husband of appellant. Mrs. Williams was then a married woman ; and the language of the conveyance is, "We, John McCreary, and Rebecca McCreary, his wife, above-named, have relinquished, and do by these presents relinquish to the said Ruthy Williams, wife of William Williams, and her bodily heirs, to their exclusive use, benefit and behoof, all the right, title," &c. The word *exclusive* is sufficient to exclude the marital rights of Mr. Williams. *Gould v. Hill*, 18 Ala. 84.

We suppose the argument against the sufficiency of the language to exclude Mr. Williams' marital rights, rests on the supposition, that the words "*to their exclusive use*" give the use and enjoyment of the property jointly to Mr. and Mrs. Williams. Such is not its import. The word *their* refers to *Mrs. Williams and her bodily heirs* ; and the

name of her husband was inserted solely for the purpose of rendering the description of *the grantee* (Mrs. Williams) more complete.

It does not vary this question; that the phrase *bodily heirs* is one of mere limitation. We are not inquiring whether any persons could claim this property as purchasers, under that designation. We are in search of the meaning which the grantor attached to the language he employed; and, however much he may have mistaken the legal import of his own language, still he believed he was describing a definite class of persons; and when he added, that the slave was conveyed to "*their exclusive use*", his meaning was, that the slave should go exclusively "*to Ruthy Williams and her bodily heirs*".—See *Johnson v. Johnson*, 32 Ala. 642.

[2.] The bill in this case alleges, that Mrs. Sunday, the mother of complainant and of Mrs. McCreary, gave to them the slave Ruth and her future increase, and secured the property to their sole and separate use; "and delivered said woman and her children to the said Rebecca (McCreary) for the use of the said Rebecca and your oratrix". The bill then alleges, that a division of the property was made by the two sisters; that on such division the boy Pickens fell to Mrs. Williams, and that thereupon Mr. and Mrs. McCreary conveyed the slave Pickens to the exclusive use of Mrs. Williams *and her bodily heirs*. Under these averments, the right of Mrs. Williams to claim the slave Pickens as her separate estate rests on the terms of the alleged gift of Mrs. Sunday, the mother. The proof utterly fails to show that the property was secured to the separate use of Mrs. McCreary and Mrs. Williams, by the terms of the gift from their mother; and, in fact, fails to show that there was such gift. The averments of the bill, then, considered in connection with the entire failure to prove that the property was secured to the separate use of the two sisters by the terms of the gift from their mother, make out a case of tenancy in common between Mrs. McCreary and Mrs. Williams, the possession being in Mrs.

McCreary. The possession of one tenant in common, is the possession of both; and, under well-settled rules, the marital rights of Mr. Williams attached to his wife's interest in the property thus held.—See *Walker v. Fennex*, 28 Ala. 367, and authorities cited.

[3.] The property, then, at the time of the division, was the property of Mr. McCreary and Mr. Williams, so far as the testimony in this record enables us to ascertain its ownership; and the attempt to secure the slave Pickens to the exclusive use of Mrs. Williams was but an attempt by the husband to settle his own property on his wife. This, if free from fraud, actual or constructive, might in some cases be done, and the transaction would be upheld in equity. See *Williams v. Maull*, 20 Ala. 730, *et seq.*; *Wilson v. Sheppard*, 28 Ala. 629; *Cole v. Varner*, 31 Ala. 244. It does not appear in this case, that the debts under which this property was sold, had any existence when the title was thus attempted to be settled on Mrs. Williams. But the proof shows that, in that attempted settlement, the parties were influenced by the intention to hinder and defraud the creditors of Mr. Williams, the husband. This *intent to defraud* avoided the conveyance, and renders the property subject to after-contracted debts of Mr. Williams.—See *Huggins v. Perrine*, 30 Ala. 398, and authorities cited; *Kavanaugh v. Thompson*, 16 Ala. 817.

If it be objected that this defense was not insisted on in the answer, and therefore cannot be allowed, the answer is found in the fact, that the equity of this feature of complainant's bill does not rest on the separate estate created by the act of Mr. Williams, the husband. It goes beyond that, as we have shown, and claims that the property was secured against Mr. Williams' marital rights, by the terms of Mrs. Sunday's gift. Under these circumstances, even if the variance between the averments and the proof do not defeat the present bill—a question we need not and do not decide—still the complainant is in no condition to invoke the rule of practice above supposed. The complainant does not, in her bill, rely on the title created by her hus-

band, and cannot claim that the defendants should specially avoid that which in the bill appears to be simply an incidental averment.

It being shown that the slave Pickens never was the property of Mrs. Williams, it follows that the money for which he was sold was not hers; and hence her claim of the slave Nancy has no foundation to rest on.

Decree of the chancellor affirmed.

FORRESTER vs. FORRESTER.

[PROCEEDING BEFORE PROBATE COURT FOR ALLOTMENT OF DOWER.]

1. *Sufficiency of petition, in stating names of heirs-at-law.*—In a petition for dower, an averment that the decedent “left him surviving” certain children and grandchildren, whose names are specified, is not a sufficient compliance with the statutory requisition (Code, § 1361) that the petition “must contain the names of the heirs-at-law”; such an averment does not negative the existence of other heirs, in addition to those whose names are specified.
2. *Parties to proceedings, where land has been sold for division.*—Although the sale of a decedent's real estate, under an order of the probate court, for the purpose of making an equitable division among the heirs, does not affect the widow's right of dower; and although the statute (Code, § 1361) does not require that the name of the purchaser at such sale shall be stated in the petition for dower; yet, it is a safe and proper practice to allege the fact of such sale in the petition, and to give notice of the application to the purchaser.

APPEAL from the Probate Court of Tuskaloosa.

In the matter of a petition for dower, filed by Mrs. Sarah Forrester, as the widow of William Forrester, deceased, against the administrators and heirs of said decedent. The administrators demurred to the petition, on the ground (*inter alia*) that it did not state who were the heirs-at-law of the decedent; but the court overruled the demurrer, and held the petition sufficient. The administra

tors then filed a special plea, alleging that the lands in which dower was claimed had been sold, under an order of the probate court, for the purpose of making an equitable division among the heirs, and insisting that the purchaser at the sale ought to be made a party to the proceedings; to which plea the court sustained a demurrer. The overruling of the demurrer to the petition, and the sustaining of the demurrer to the plea, are now assigned as error.

E. W. PECK, for the appellants.

R. W. WALKER, J.—In the case of *Martin's Heirs & Adm'rs v. Martin*, (22 Ala. 86,) it was held that a petition for dower must show who were the heirs-at-law of the deceased. This rule has been incorporated into our statute law. Section 1361 of the Code provides, that the petition for dower "must contain", among other things, "the names of the widow and heirs-at-law." The petition in this case fails to state who are the heirs-at-law of the intestate, unless that is done by the averment that "he left him surviving" certain children and grandchildren, whose names are given. We do not think that this allegation satisfies the statute. The form of averment adopted is consistent with the supposition that there are other children and grandchildren than those named in the petition, and who equally with those named are heirs-at-law of the deceased. As this objection is fatal to the petition, we need not inquire whether any of the other grounds of demurrer were well taken. They can all be readily obviated in the probate court by an amendment of the petition. Neither do we think it necessary to examine as to the alleged irregularities in the subsequent proceedings in the probate court. All of these can be avoided in the future conduct of the case.

[2.] It may not be amiss, however, to make a remark as to the matter alleged in the special plea interposed by the administrators. It is true that a sale of real estate, under

an order of the probate court, does not affect the widow's right of dower.—*Owen v. Slatter*, 26 Ala. 547. It is also true, that while the Code provides, that when the land has been aliened in the life of the husband, the petition must contain the name of the alienee, and his residence, if known, (Code, § 1361,) it does not make the same requirement where the land has been sold under an order of the probate court, after the death of the husband. But, where the land has thus been sold after the husband's death, and has passed into the possession of the purchaser, there can be, to say the least, no impropriety in alleging that fact in the petition, and giving notice of the application to the purchaser. Parties will be on the safe side if they pursue this course.

For the error pointed out, the decree is reversed, and the cause remanded.

CLOPTON AND WIFE vs. JONES' EXECUTOR.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Will authorizing estate to be kept together, and family to be supported jointly out of income.*—A will containing the following provisions—“I wish my just debts first satisfied and paid, and the balance of my estate to be kept together till my oldest child becomes of age or marries; then, I wish that child to draw an equal part of my estate, except the land; the balance of the children to be dealt with as the oldest or first—to remain together with their mother, until such time as they attain age or marry; at which time, I wish each one to draw his or her equal part of my estate, except the land. When my youngest child becomes of age, or marries, I wish my wife to take her dower in my lands, and a child's part of my other property; and the balance of the land I wish sold, and the moneys arising from such sale to be equally divided among my children. I wish my children to receive a good English education, and my sons to be raised to business”—authorizes the family to be kept together and supported jointly out of the income of the estate; consequently, the special expenses incurred by one of the children, prior to her marriage or attainment of majority, are not a proper charge against her separate distributive share of the estate.

APPEAL from the Probate Court of Madison.

IN the matter of the final settlement and distribution of the estate of Arthur W. Jones, deceased, and the settlement of the accounts and vouchers of Friley Jones, the executor. The will of the said Arthur W. Jones, which was admitted to probate on the 21st October, 1833, contained the following clauses: "I wish my just debts first satisfied and paid, and the balance of my estate to be kept together till my oldest child becomes of age or marries; then, I wish that child to draw an equal part of my estate, except the land; the balance of the children to be dealt with as the oldest or first—to remain together with their mother, until such time as they attain age or marry; at which time, I wish each one to draw his or her equal part of my estate, except the land. When my youngest child becomes of age, or marries, I wish my wife to take her dower in my lands, and a child's part of my other property; and the balance of the land I wish sold, and the moneys arising from such sale to be equally divided among my children. I wish my children to receive a good English education, and my sons to be raised to business. I give to my son William Arthur my gold watch, when he arrives at the age of twenty-one years: should he die before he becomes of age, I wish my son James Monroe to have it when he attains the age of twenty-one years." The testator left a widow and four children surviving him. The widow dissented from the will, and married Benjamin Coyle in 1837; and in 1838, under orders of the orphans' court, her dower was allotted to her, together with one-fifth part of the slaves belonging to the estate. In February, 1840, Mary W. Jones, one of the testator's children, married R. J. Clopton; and in January, 1841, under orders of the orphans' court, one-fifth part of the slaves was allotted to her and her said husband.

On the settlement of the executor's accounts, as appears from the bill of exceptions, it was ascertained that, up to January 1, 1841, he had received assets amounting to

\$20,476 41, and had expended in payment of debts, and in keeping the estate together and working it, \$19,576 98 ; leaving a balance of \$899 43 in his hands, subject to distribution. Thereupon, Clopton and wife moved the court to render a decree in their favor, against the executor, for one-fourth part of that amount. The executor resisted this motion, and proved to the court that, during the years 1834, 1835, 1836, 1837, 1838, 1839, and 1840, he, as executor, had paid accounts contracted by Mrs. Clopton for board, clothing, tuition, &c., amounting in the aggregate, with interest, to about \$3,300. It was shown, also, that after the widow drew out her portion of the estate, the executor rented out the lands, and hired out the negroes, during the years 1838, 1839, and 1840 ; and that Mrs. Clopton was a minor at the time of her marriage. The inventory and appraisement of the estate were also read in evidence. "On this proof, Clopton and wife contended, that the executor was not entitled to a credit for the accounts so paid by him ; and that if he was entitled to any credit at all therefor, then not for the full amount claimed, because said expenditures were extravagant, not suitable to her estate and condition, and exceeded each year her share of the income of the estate." The court held, that the executor was entitled to a credit, as against Clopton and wife, for the full amount of the accounts so paid by him, and therefore refused to render any decree against him, in their favor, for Mrs. Clopton's interest in the balance subject to distribution. It was shown, also, that the executor had sold the lands of the estate after the youngest child had attained his majority, and received \$1,920 92 as the proceeds of sale ; and Clopton and wife asked the court to render a decree against the executor, in their favor, for one-fourth of the amount so received ; but the court refused to render any decree against him on that account. These two rulings of the court, to which exceptions were reserved by Clopton and wife, are now assigned as error.

JAMES ROBINSON, for appellants.

R. C. BRICKELL, *contra*.

A. J. WALKER, C. J.—The construction which was put upon a will of somewhat similar provisions in *McLeod v. McDonald*, (6 Ala. 236,) is a precedent for construing the will in this case, as authorizing the keeping the family together, and supporting them from the income of the estate in the hands of the executor; and we adopt that construction. The intention of the testator, as implied from the will, was, that the wife and children should, until a specified event occurred, preserve the family relation towards each other, to be broken only as the children should marry, or attain majority; that the family should be maintained from the income of the estate, and that the management of the estate should correspond, as nearly as possible, in its relation to the wife and children, to the beneficent arrangements of a husband and father, directing his property and its income to the single purpose of benefitting the family. A large portion of the expenses devolving upon the estate would necessarily attach to the family collectively, so as to prevent the ascertainment of the distinct portions attributable to the respective members of the family. The widow and each one of the children would necessarily be the cause of some expenses, which would be separate and distinguishable from the expenses of the collective family. The expenses incurred by the family in its collective capacity must, of necessity, have been a charge upon the general fund produced by the income of the estate. So, we think the distinguishable expenses of the respective children were charges upon the same fund, and not upon the several shares of the children for whom the expenses were incurred. The will makes no distinction between that part of the family maintenance which was enjoyed in common, and that part which was enjoyed by the members of the family separately; and it would be difficult to find an argument by which the testator's intention that such a distinction should be made could be proved. The will neither provides for a division of the income, nor establishes any distinct interests in it, but leaves it as a common stock for common enjoyment; and it seems to us

that, to charge upon the individuals deriving a support from the income the amount received, would infringe the manifest spirit of the instrument.

The decision in *Pickens v. Pickens*, (35 Ala. 442,) was made in reference to an estate kept together under the statute, one section of which required, that separate accounts should be kept of moneys appropriated and expended for each distributee. The decision in that case, pronounced upon the authority of that and other provisions of the statute, can not afford a rule for our guidance in this case. So, also, in *Pinckard v. Pinckard*, (24 Ala. 250,) we find no analogy to guide us in this case; because there was no will, and the distributees having no right, save that which pertained to them in their capacity of distributees, were properly charged with whatever might be received by them respectively as a part of their distributive shares of the estate. For these reasons, we decide, that the court erred in charging the appellant separately with the sums expended in her maintenance and education, before her marriage or attainment of majority.

We are not able to pronounce, upon the evidence before us, that the appellant's expenses were for articles not suitable to her fortune and condition in life.

Reversed and remanded.

WELLS vs. MORROW.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND.]

1. *Assignment of purchaser's notes for price of land.*—An assignment of notes, given for the purchase-money of land, carries with it the vendor's lien on the land for their payment; and the assignee may enforce the lien in equity, in his own name.
2. *Plea of purchase for value without notice.*—A plea of a purchase for valuable consideration without notice, must aver the actual payment

- of the money, and must negative notice at the time of the payment.
3. *Absolute deed held mortgage.*—A deed, absolute on its face, which is shown to have been intended to secure an antecedent debt, and to have been accompanied with a parol agreement that, on the payment of the debt within a reasonable time, the land should be reconveyed to the grantor, will be treated in equity as a mortgage.
4. *Who is purchaser for valuable consideration without notice.*—A mortgage, taken to secure the payment of a debt contemporaneously contracted, constitutes the mortgagee a purchaser for valuable consideration, who will be protected in equity against an outstanding vendor's lien of which he had no notice; *secus*, where the mortgage is taken to secure the payment of a pre-existing debt; and where a part of the secured debt is contemporaneously contracted, and the residue is pre-existing, he will be protected only to the extent of the new debt.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 22d March, 1855, by Abner J. Wells, against Thomas L. Morrow, Thomas A. Fleming, Henry E. Fleming, and John L. Fleming. Its object was, to subject a certain tract of land, which was in the possession of the defendant Morrow, to the payment of three notes held by the complainant. The land belonged to Thomas A. Fleming, and was sold by him, on the 1st February, 1851, to his two sons, Henry E. and John L. Fleming. The stipulated price was \$300, for which four notes were executed by the sons; each executing two notes, one for \$100, and the other for \$50, payable on the 25th December and 1st January, 1852; and three of these notes were afterwards assigned by Thomas A. Fleming to the complainant, by an endorsement on each in the following words: "I assign the within note to A. J. Wells, and I am to stand good for it until it is paid, for value received this 7th February, 1852." No deed was executed by Thomas Fleming to his sons, but he gave them a bond, conditioned to make titles to the land on or before the 25th December, 1852. On the 1st June, 1854, Thomas A. Fleming conveyed the land, by deed absolute on its face, to Thomas L. Morrow, and delivered the possession to him. The consideration recited in the deed was \$400 in hand

paid; but the real consideration, as proved, was certain antecedent debts due from Thomas Fleming to Morrow, and a debt of small amount due to Morrow from one of Fleming's sons. Morrow admitted in his answer, that there was a parol agreement between him and Thomas Fleming, contemporaneous with the execution of the deed, to the effect that he should reconvey the land to said Fleming, on the payment of \$400 by the latter within a reasonable time. He alleged, that Thomas Fleming was in possession of the land at the time of his purchase; that the alleged sale by Thomas Fleming to his two sons was fraudulent and void, and, if valid, should not be allowed to affect his rights, as he purchased without notice. A decree *pro confesso* was taken against all of the other defendants.

On final hearing, on pleadings and proof, the chancellor held, that the complainant was entitled to equitable relief, but that his claim must be postponed to that of Morrow. He ordered an account to be stated by the master, to ascertain the amount due to each of them; and directed a sale of the land, and the satisfaction of Morrow's debt out of the proceeds,—the balance, if any, to be paid to the complainant. The land was offered for sale under the decree, but the amount bid for it not being enough to pay Morrow's debt, no sale was made; and on a report of these facts by the register, the chancellor dismissed the complainant's bill. The final decree is the only matter assigned as error.

BYRD & MORGAN, with C. G. SAMUEL, for appellant.
S. LEIPER, *contra*.

STONE, J.—The right of complainant to proceed by bill to subject the land in controversy to the payment of the three notes which were executed to secure the purchase-money, is too well settled to be open to further controversy. The present case, in that feature of it, is not distinguishable from former cases, which have received the sanction of this court.—See *Connor v. Banks*, 18 Ala. 42;

Kelly v. Payne, 18 Ala. 371; *Rosser v. McCook*, 7 Ala. 318.

The only defense in this case which we deem it necessary to notice, is that which claims that Mr. Morrow is a *bona-fide* purchaser of the land, without notice of the sale by Thomas Fleming to his sons John and Henry. The facts set out in the record do not enable us to affirm that Mr. Morrow had notice of the former contract of sale, either actual or constructive; and the question arises, was he a purchaser within the rule invoked?

[2.] Before considering this question, a point arises on the pleadings, which we feel it our duty to consider. There is no averment in the answer, that Mr. Morrow had paid the purchase-money for the land; and hence, his defense of purchaser without notice must fail on that account. In the case of *Jewett v. Palmer*, (7 Johns. Chan. 68,) Chancellor Kent said: "A plea of a purchase for valuable consideration without notice, must be with the money *actually paid*; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice at or before the date of the execution of the deeds, but that the purchase-money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money." To the same effect are *Wormley v. Wormley*, 8 Wheat. 449; 2 Story's Equity, § 1502; Mitford's Ch. Pleading, m. p. 275; *Wood v. Mann*, 1 Sumner, 510; *Flagg v. Mann*, 2 Sumner, 563; *Harrison v. Southcote*, 1 Atk. 538; *Bradlin v. Ord*, *ib.* 571; *Fitzgerald v. Burk*, 2 Atk. 397; *Hardingham v. Nicholls*, 3 Atk. 304.

The result of what we have said is, that the decree of the chancellor must be reversed. But, as other questions may arise again when this case returns to the chancery court, we will lay down some rules for its future government.

[3.] Governed by the evidence in the record before us, we hold, that the deed from Thomas Fleming to Mr. Morrow, though absolute on its face, is only a mortgage security for money.—*Crews v. Threadgill*, 35 Ala. 342;

Turnipsced v. Cunningham, 16 Ala. 501; *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254; *Flagg v. Mann*, 2 Sumner, 486, 534.

[4.] A mortgage to secure a debt, cotemporaneously contracted, constitutes the mortgagee a purchaser. This rests on the principle, that the mortgage security enters into the consideration on which the credit is given.—*Willard's Equity*, 257; *Fash v. Ravesies*, 32 Ala. 457. On the other hand, when a mortgage is taken to secure a pre-existing debt, the mortgagee does not become a purchaser, in that sense which, being without notice of a pre-existing equity, will cause his title to prevail over that of the prior equitable claimant.—*Fenno v. Sayre*, 3 Ala. 470; *Andrews v. McCoy*, 8 Ala. 920; *Boyd v. Beck*, 29 Ala. 713; *Dickerson v. Tillinghast*, 4 Paige, 244; *Padgett v. Lawrence*, 10 Paige, 181; *Willard's Equity*, 256.

Our registration statutes place in the same category creditors and purchasers without notice of an unregistered prior conveyance which by law is required to be recorded. The creditors here meant are judgment creditors, having a lien.—See *Daniel v. Smith*, 9 Ala. 436; *DeVendell v. Hamilton*, 27 Ala. 164; *Jordan v. Mead*, 12 Ala. 251; *Fash v. Ravesies*, 32 Ala. 451; *Bryan v. Cole*, 10 Leigh, 500; *Tate v. Liggat*, 2 Leigh, 98–9. But, when the equity is of that character or description which is not by law required to be recorded, the rule is different. Such equity will prevail over creditors, but will yield to a subsequent *bona-fide* purchaser without notice, either actual or constructive. Of this class is the lien which a vendor retains on lands contracted to be conveyed.—*Avent v. Read*, 2 Stew. 488; *Stone v. Hale*, 17 Ala. 557; *Fash v. Ravesies*, *supra*; *Donald v. Hewitt*, 33 Ala. 549; *Ligon v. Rogers*, 1 Georgia, 290; 1 Story's Equity, § 165.

The testimony in this case tends to the conviction that, as to some twenty dollars of the debt to Mr. Morrow, he must be regarded as a purchaser. This consists of the item of some twenty dollars, the debt of the younger Fleming, which Thomas A. Fleming, the father, took up when he

conveyed the lands in controversy to Mr. Morrow. As to the residue of the consideration on which the mortgage rests, it is simply a prior debt, due from Thomas A. Fleming, the mortgagor, to Mr. Morrow, the mortgagee. We have then, as this record now appears to us, the case of a mortgagee, claiming against an equity older in point of time; but which claim constitutes him a *bona-fide* purchaser without notice, as to a part of the consideration, but leaves him as to the other and larger part in the condition of a mere mortgagee, the mortgage resting on no new consideration, and being taken to secure a pre-existing debt.

It is well settled that, as against the holder of a prior equity, a subsequent purchaser, who has made part payment without notice, leaving a balance unpaid, and who then receives notice of the prior equity, can not, by afterwards paying such balance, perfect his entire claim as a purchaser without notice. Notice, received at any time before the payment is completed, or before the purchaser, by giving a negotiable security, or in some other way, has placed it out of his power to resist payment, changes the whole current of the equities.—Willard's Equity, 256-7; 2 Story's Equity, § 1502; *Boyd v. Vanderkemp*, 1 Barb. Ch. 286; Mit. Pl. 274; *Wood v. Mann*, 1 Sumner, 510. This principle applies to the case of a contract to convey land to one, and a subsequent sale of the same lands to another without notice.—Willard's Equity, 298. We therefore hold that, as to the amount of the note on the younger Mr. Fleming, which was taken up, Mr. Morrow, on proper pleadings, and on the proof in this record, must be regarded as a *bona-fide* purchaser without notice; and his mortgage interest will, to that extent, prevail over the equity of Mr. Wells. Beyond that amount, Mr. Wells has the superior equity. *Qui prior est in tempore, potior est in jure.*

The decree of the chancellor is reversed, and the cause remanded.

HALL'S HEIRS vs. HALL'S EXECUTORS.

[BILL IN EQUITY TO SET ASIDE PROBATE OF WILL.]

1. *Competency of legatee as witness for will.*—In a chancery suit to set aside the probate of a will, a legatee, to whom a pecuniary legacy is bequeathed, and who has received his legacy from the executors, may be rendered a competent witness to sustain the will, by the defendants' repaying to the executors the amount of the legacy, with interest, in discharge of any claim they might have on the legatee, and releasing the legatee, the executors, and the estate, from all liability to repay or account for the money; the legatee at the same time approving and adopting the payment, and releasing the executors from all claim on account of the legacy; and the executors accepting the payment, and releasing the legatee from all liability on account of the money paid to him.
2. *Proof of execution of will.*—Although two subscribing witnesses are necessary to the execution of a will, their testimony is not the only evidence by which the due execution of the will can be established: on the contrary, any defect in their testimony may be supplied by that of the person who wrote the will, and who was present when it was signed and attested, or by other evidence *vitunde*.
3. *What is undue influence.*—To set aside a will on the ground of undue influence, it must be shown that the influence exerted on the mind of the testator was equivalent to moral coercion, and constrained him, through fear, the desire of peace, or some other feeling than affection, to do that which was against his will.
4. *What is insane delusion.*—To establish an insane delusion on the part of the testator, such as will invalidate his will, something more must be shown than a mistaken notion on his part as to the feelings or intentions of his relatives towards him or his property.
5. *Probate of will containing invalid bequest.*—The invalidity of a particular provision or bequest in a will, which also contains valid bequests, is no objection to the probate of the will.
6. *Emancipation act of 1860 not retroactive.*—The act of January 25, 1860, "to amend the law in relation to the emancipation of slaves," (Session Acts 1859-60, p. 28,) does not affect wills which had been admitted to probate before its passage.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed on the 23d October, 1858, by some of the heirs-at-law and next of kin of Adam Hall,

deceased, for the purpose of setting aside the probate of his last will and testament, which had been duly admitted to probate on the 29th June, 1858, and of which William Echols and Joshua Beadle had qualified as the executors. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error, together with other matters which require no particular notice. The material facts of the case, so far as they are necessary to a correct understanding of the legal points decided by the court, are stated in the opinion.

S. D. J. MOORE, for appellants.

ROBINSON & JONES, *contra*.

R. W. WALKER, J.—By the will in controversy, a legacy of two hundred dollars was given to the witness Browne. After the will had been admitted to probate in the probate court, but before the bill in this case was filed, the executors voluntarily paid Browne his legacy, and took from him a receipt in full therefor. In this state of the case, Browne's deposition was taken by the defendants; the complainants in filing their cross-interrogatories objecting to the competency of the witness, "on the ground that he was interested in the result of the suit, and that the verdict and judgment would be evidence for him in another suit". At the December term, 1859, the defendants obtained leave to re-examine the witness on the same interrogatories. This order was doubtless obtained with the view of restoring his competency, if he should be deemed incompetent, and then retaking his deposition. It was then agreed by the complainants, that the defendants might do whatever could be legally done to restore the competency of the witness and that if the witness was rendered competent, his deposition already taken should "for all purposes be taken and treated as if taken after such restoration of his competency." Thereupon, Robinson & Jones, the solicitors for the defendants, with the consent and approbation of the witness, repaid the said two hundred dollars, with interest, to

the executors, in discharge of any claim they might have on Browne, and released Browne, the executors, and the estate of Hall, from all liability to repay or account for the money. Browne approved and adopted the payment, and released the executors from any claim on account of said legacy; and the executors accepted the payment, and released Browne from all liability to pay back or refund the money paid to him as legatee.

We will not inquire whether Browne was a competent witness, without the repayment of the legacy which the executors had voluntarily paid over to him; for, however that may be, we entertain no doubt, that the repayment of the money and the execution of the releases, as above stated, removed all objection to his competency, founded on the fact that he was a legatee.—*Robinson v. Tipton*, 31 Ala. 609.

[2.] The objection which is made here to so much of the testimony of Browne as relates to the identity of the will, cannot prevail, even if we concede that it does not come too late. The point of the objection is, that the testimony of the subscribing witnesses does not sufficiently identify the will offered for probate, as the one which was attested by them; and that this deficiency in their testimony cannot be supplied by evidence *aliunde*. Without stopping to inquire whether there was, in fact, any such deficiency in the evidence of the subscribing witnesses as is alleged, it is enough to say, that no error was committed in allowing any defect in the testimony on that point to be supplied by the evidence of the witness who wrote the will, and who was present when it was signed and attested. The law makes two subscribing witnesses indispensable to the formal execution of a will; but it by no means follows, that the testimony of these witnesses is the only evidence by which the due execution of the will can be established. On the contrary, it is laid down as undoubted law, that if, from forgetfulness, the subscribing witnesses should fail to prove the formal execution of the will, other evidence is admissible to supply the deficiency; or, if the subscribing witnesses all swear that the will was not duly executed,

they may be contradicted, and the will supported by other witnesses, or by circumstances.—*Lowe v. Joliffe*, 1 Bl. Rep. 365; *Jackson v. Christman*, 5 Wend. 277; *Bell v. Clark*, 9 Ired. 242; 1 Jarm. Wills, (ed. 1855,) 224.

As is usual in contests of this character, there is some conflict in the evidence; more, however, in matters of opinion, than of fact. Without attempting a discussion of the mass of testimony to be found in this record, it is enough to say that, in our opinion, the will is sustained by a decided preponderance of evidence. Three attending physicians, the two subscribing witnesses, the writer of the will, and a large number of other witnesses, prove the capacity of the testator. On the other side, the witnesses to prove incapacity are not so numerous, and, in general, their evidence is much less pointed and satisfactory.

[3-4.] The charges that the will was procured by undue influence, and executed under an insane delusion, are not supported by the evidence. To make out a charge of undue influence, the contestant must show that an influence was exerted upon the mind of the testator, which was equivalent to moral coercion, and constrained him to do that which was against his will, but which, from fear, the desire of peace, or some other feeling than affection, he was unable to resist.—*Gilbert v. Gilbert*, 22 Ala. 529; *Taylor v. Kelly*, 31 Ala. 59. And to establish insane delusion, the contestant must do something more than simply show “a mistaken notion” on the part of the testator, as to the feelings or intentions of his relatives, in reference to him or his property.—*Mosser v. Mosser*, 32 Ala.

[5.] The question of the validity of any particular provision or bequest of the will, is not now before us. If the provision for the emancipation of the slaves be admitted to be void, that would not defeat the probate of the will, which contains other bequests, the validity of which is not questioned.

[6.] We have no hesitation in saying, that the act of January 25, 1860, “to amend the law in relation to the emancipation of slaves,” (Acts '59-60, p. 28,) has no ap-

Tarver v. Smith.

plication to will, which had been admitted to probate before its passage.

Decree affirmed.

TARVER vs. SMITH.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Who may join as plaintiffs.*—An executor, suing in his representative capacity, and the devisees under the will, cannot join as plaintiffs in a real action in the nature of an ejectment.
2. *Transfer of Indian reservation; what title will support action.*—A transfer by a Creek Indian of his reservation under the treaty, approved by the president of the United States, confers on the grantees such title as will support an ejectment; and where the grantees are a partnership, each partner may maintain a separate action for his undivided interest.
3. *Same.*—If the several grantees, in such case, by agreement in writing, not under seal, divide the land among themselves, the agreement does not confer on any partner the title to the particular portion of land allotted to him.
4. *Validity of patent in name of deceased person.*—Prior to the passage of the act of congress approved May 20, 1836, (Brightly's U. S. Digest, 465,) a patent, issued in the name of a deceased person, was void; but, under that act, such patent vests the title in the decedent's heirs, devisees, or assignees, as if it had been issued to him during life.
5. *Assignment of approved contract for purchase of Indian reservation.*—An assignment, not under seal, of an approved contract for the sale and purchase of an Indian reservation, although it does not convey to the assignee the title conferred by the approved contract, is nevertheless sufficient to authorize the issue of a patent to him; and the validity of a patent, subsequently issued to the assignee, is not affected by the fact that the assignment was not under seal.
6. *Amendment of complaint, as to parties.*—If an action is brought by a sole plaintiff, and the names of others as co-plaintiffs with him are added by amendment, (Code, § 2403,) the name of the original plaintiff cannot be struck out by a subsequent amendment.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. PORTER KING.

THIS action was brought by Elijah W. Tarver, as the

surviving executor of the last will and testament of Benjamin P. Tarver, deceased, against Alexander Smith and others, to recover the possession of a tract of land, which was described in the complaint as "the east half of section eighteen, in township twenty-one, range twenty east, in the Tallapoosa land district;" and the names of Elijah W. Tarver individually, William Tarver, and James M. Tarver, were afterwards added as plaintiffs, by an amendment of the complaint. The defendants pleaded, "in short by consent, not guilty, the statute of limitations of ten years, and adverse possession for three years, with the erection of valuable improvements." On the trial, as appears from the bill of exceptions, the plaintiffs offered in evidence a transcript from the records of the general land-office at Washington, showing that the land in controversy was the reservation of a Creek Indian, and was sold by him, on the 23d April, 1835, to Elijah Corley, Benjamin P. Tarver, and four others, partners composing the firm of E. Corley & Co.; that on the 19th November, 1835, on a division of the lands belonging to the said firm among the several partners, the tract in controversy was allotted to said Benjamin P. Tarver; and that on the 24th October, 1839, the contract for the purchase of the reservation by E. Corley & Co. was approved by the president of the United States. The plaintiffs also read in evidence a certified copy of the last will and testament of said Benjamin P. Tarver, which was duly admitted to probate in July, 1840, and by which Elijah W., William, and James M. Tarver, were made the residuary legatees and devisees of the testator. The defendants read in evidence a patent from the United States, dated the 5th July, 1844, by which the land in controversy was granted to said Benjamin P. Tarver. "The court thereupon decided, that the plaintiffs had not shown such a title as would enable them to maintain this action; to which ruling of the court the plaintiffs excepted, and were compelled to take a nonsuit;" and they now assign this ruling of the court as error.

MARTIN, BALDWIN & SAYRE, for appellant.

JOHN T. MORGAN, and J. Q. LOOMIS, *contra*.

STONE, J.—A question meets us at the threshold of this case, which is fatal to the plaintiffs' right of recovery on their present complaint. At the fall term, 1857, the plaintiff obtained leave to amend his complaint, by adding the names of the three devisees of the land in controversy, as plaintiffs in the cause. The suit had been commenced in the name of Elijah W. Tarver, as executor of Benjamin P. Tarver, deceased; and the names added were William Tarver, James M. Tarver, and the said Elijah W. Tarver in his own right. The amendment, then, makes the case of an action to recover the possession of land, in the nature of an action of ejectment, (Code, § 2209,) prosecuted in the name of the only surviving executor, suing in his representative capacity, conjoined with the names of the devisees of the lands in controversy; the will not conferring the title of the lands upon the executor. It needs no argument to show, that the rights of the executor, as such, in the lands of his testator, are entirely unlike those of the devisees of the fee. The devisees have the absolute property in the estate, subject to be defeated, in a limited class of cases, by the assertion of certain specified powers with which the legislature has clothed the executor. The respective rights of the parties cover no grounds in common; the rights of the one yielding to the extent that the other can be asserted. True, each may maintain an action of ejectment, to recover the possession of the lands; but their several rights over the lands when recovered are fundamentally unlike.

Our decisions have placed the right of the personal representative to maintain ejectment for the recovery of lands of his testator or intestate, mainly on the ground that such personal representative is entitled to the rents in arrear at decedent's death, and to the after-accruing rents, as assets of the estate until distribution is made.—See *Harkins v. Pope*, 10 Ala. 493; *Golding v. Golding*, 24 Ala. 122; *Patton v. Crow*, 26 Ala. 426; *Boynton v. McEwen*, 36 Ala. 348.

A moment's reflection will satisfy any one, that the right of the devisees to maintain an action rests on their *ownership* of the property. The two classes of plaintiffs, having no interests in common, cannot maintain a joint action under the Code.—*Doe v. Edrington*, 3 Nev. & Man. 646, and note; *Jackson v. Sidney*, 12 Johns. 185; *Walker v. Fenner*, 28 Ala. 367; 1 Chitty's Pleadings, 62, 64, 65.

This is an error, which, if the attention of the circuit court had been directed to it, would have justified the charge, that the *plaintiffs* could not maintain the action in their joint names. But the question was not made in the court below; and hence, the plaintiff has had no opportunity to perfect his pleadings by an amendment.—See *Cox v. McKinney*, 32 Ala. 466-7; *Williams v. Agee*, 30 Ala. 636. It thus becomes our duty to investigate the other questions in the record.

[2.] The circuit judge charged the jury, that the evidence of title adduced by the plaintiffs was not sufficient to prove title in their testator to the premises in controversy. By what claim of title the defendant was in possession—whether under color of title, or as a mere trespasser—we are not informed. In the absence of all proof on this question, we can not presume he was in by virtue of any title, either valuable or colorable.—*Crommelin v. Minter*, 9 Ala. 605. But, conceding that he may have been in possession under title colorable but not good, the executor, as the case now appears to us, (and leaving out of view the patent after-noticed,) was entitled to a partial recovery. The plaintiffs put in evidence a contract, or transfer, from a reservee of the Creek tribe of Indians, conveying the lands in controversy to E. Corley & Co., certified by the government agent appointed for the purpose, and approved by the president of the United States. The Indian who thus conveyed to E. Corley & Co., was located on these lands. Benjamin P. Tarver, plaintiff's testator, was a member, and, with five others, composed the firm of E. Corley & Co. Testator was, then, seized as a joint tenant, with five others, of an undivided sixth part of the

lands sued for. This, in the absence of other proof of title, authorized a recovery, at least to that extent, under the following well-settled principles of law :

First : The deed from the Indian reservee to E. Corley & Co., after it received the approval of the president of the United States, clothed the grantees with such title as that they could maintain ejectment upon it.—*Jones v. Mardis*, 5 Porter, 327 ; *Crommelin v. Minter*, 9 Ala. 594 ; *Haden v. Ware*, 15 Ala. 149.

Second : The owner of an undivided interest in lands, having a legal title, may maintain a separate action of ejectment against one wrongfully in possession, and may recover to the extent of his ownership in the premises. *Sawyer v. Fitts*, 2 Porter, 9 ; *Hines v. Greenlee*, 3 Ala. 73 ; *Bonner v. Greenlee*, 6 Ala. 411 ; *Chastang v. Armstrong*, 20 Ala. 609.

[3.] The defendants put in evidence a patent issued from the government of the United States to Benjamin P. Tarver, dated July 5th, 1844, conveying the lands in controversy to said testator. It is conceded for appellant that Benjamin P. Tarver died before July 5th, 1844 ; and on this account he contends, that the patent is void ; while on the other hand, the appellees, taking it for granted that the patent is void, contend that the appellant has shown no such title in his testator as that ejectment can be maintained upon it. The argument for appellees is as follows : The approved contract and conveyance from the Indian reservee to E. Corley & Co., vested the title jointly in the six members composing that firm ; and the division by which the land which is the subject of this suit was assigned to testator, although in writing, and signed by the parties, is not evidenced by any instrument under their seals, and, hence, conveyed no legal title to Benjamin P. Tarver.

It must be conceded, that the instrument by which the division of the lands was evidenced, does not confer on Mr. Tarver, or his executor, such right to the interests thus conveyed as that ejectment can be maintained on such title.

Ansley v. Nolan, 6 Porter, 379 ; *Thrash v. Johnson*, *ib.* 458 ; *Falkner v. Jones*, 12 Ala. 165. And it follows from this, that if the present action were prosecuted by the executor alone, and the patent to Benjamin P. Tarver had not been put in evidence, the plaintiff, in the absence of some valid defense, would have been entitled to recover only one undivided sixth part of the lands.

[4.] But the issue of the patent to Benjamin P. Tarver, occurring, as it did, after the death of Mr. Tarver, presents this question in an entirely different aspect. Before the act of congress of 1836, a patent, issued in the name of a person who was dead at the time it issued, was void.—*Galt v. Galloway*, 4 Peters, 332 ; *McDonald v. Smalley*, 6 Peters, 261 ; *Moreham v. Phelps*, 21 How. (U. S.) 294 ; *Wood v. Ferguson*, 7 Ohio St. R. 288. By the act of congress approved May 20th, 1836, it is enacted, that “in all cases where patents for public lands have been, or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to, and become vested in the heirs, devisees, or assignees of such deceased person, as if the patent had issued to such deceased person during life.” *Brightly’s Digest*, 465.

[5.] In the case of *Haden v. Ware*, (15 Ala. 149,) Ware claimed under a patent issued to him as the assignee of Watson & Co. Watson & Co. held an approved contract from the Indian reservee ; and they, by themselves and by their attorney in fact, assigned and transferred said contract and their interest in said land to R. J. Ware. On this Ware obtained his patent. The report of the case does not furnish a copy of the transfer from Watson & Co. to Ware ; but we have looked into the record, and find it was not under seal. Speaking of the strength of Ware’s title, this court said : “We think it very clear, that the legal title to the land passed to Ware by the patent. By the treaty, the ultimate fee in the land reserved for the Indians, remained in the government ; and the purchaser from an Indian re-

servée acquired no title by the purchase, until the contract was approved by the president. When this was done, the purchaser became entitled to a patent, which, when issued, carried the fee to the patentee. * * * * In reference to the land in dispute, the title was in the government, and the president was authorized to issue a patent to Watson & Co. A patent was issued, under their authority, to Ware, and it vested in him the legal title."

The question presented in the case of *Ware v. Haden*, was, in all respects, precisely like the question in this record, if we leave out of view the fact that Mr. Tarver had died before the patent issued to him.—See, also, *Iverson v. Dubose*, 27 Ala. 418. That case, then, is decisive of this, so far as to show that the writing entered into on the division of the lands owned by E. Corley & Co. was ample authority to the government of the United States to issue a patent to Mr. Tarver; and, unless the prior death of Mr. Tarver brings the case under a different rule, it further shows that the patent to Mr. Tarver divested the title and right to maintain ejectment out of E. Corley & Co., and leaves the plaintiff's right of action resting on the patent.

The result of the principles above declared is, that before and at the time of Mr. Tarver's death, he had and held an ownership and right, in and to the lands in controversy, which authorized a patent to issue to him "*in pursuance of a law of the United States*"; and when, after his death, the patent was issued in his name, it was not void, but *the title inured to and vested in* his heirs, devisees, or assignees, under the act of congress of 1836.—*Schidda v. Sawyer*, 4 McL. 184; *Stubblefield v. Boggs*, 2 Ohio St. R. 216; *McArthur v. Dun*, 7 How. (U. S.) 262.

[6.] We have thus shown, that the devisees of Mr. Tarver, if suing alone, could maintain the present action against any one who had not a paramount title. The act of 1836 can not aid the executor; for it confers title only on the "heirs, devisees, or assignees." The executor being joined as a plaintiff, defeats the recovery, and would have justified a general charge for the defendant, if the court had

given it. Nor can this defect be remedied by amendment. The action was commenced by the executor alone. The complaint was afterwards amended, by adding the names of the devisees as plaintiffs. The only amendment which could bring the case within the principles we have declared, would consist in striking out the name of the executor, thus leaving the complaint in the names of the devisees. This, under our decisions, can not be allowed.—*Leaird v. Moore*, 27 Ala. 326; *Pickens v. Oliver*, 32 Ala. 626.

Our decisions, allowing, in this court, revivors in favor of both the administrator and the heir, in certain classes of ejectment suits, (resting, as they do, on statutes which rendered the introduction of that anomaly into our jurisprudence necessary to prevent injustice,) can have no application to a suit commenced originally by the heir or personal representative.—See *State ex. rel. Nabors*, 7 Ala. 459; *Jordan v. Abercrombie*, 15 Ala. 580; *Ex parte Swan*, 23 Ala. 192.

The judgment of the circuit court is affirmed.

GOODMAN & MITCHELL vs. WALKER.

[PETITION FOR SUPERSEDEAS OF EXECUTION.]

1. *Special supreme court*.—When two of the judges of the supreme court are incompetent to sit in a cause, and the remaining judge, being of opinion that the judgment of the court below ought to be reversed, certifies the facts to the governor for the appointment of a special court, (Code, § 573,) and then goes out of office, before the cause is decided by the special court,—the authority of such special court is at an end; and if the succeeding judge is competent to sit in the cause, it must be heard before him; and if he is of opinion that the judgment should be affirmed, his judgment is of the same force and effect as if it were the judgment of a majority of the supreme court.
2. *Amendment of execution*.—On motion to supersede and quash an execution, the court may allow the execution to be amended, by striking out the name of one of the defendants, so as to make it conform to the judgment on which it was issued.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

IN this case, the appellants filed their petition, for the purpose of superseding and quashing an execution, which was issued on a judgment rendered by said circuit court, on the 26th March, 1853, in favor of Maria Walker, as executrix of John H. Walker, deceased. In the case in which said judgment was rendered, the defendants sued out an appeal to the supreme court, at its June term, 1853. At the January term, 1855, the judgment of the circuit court was affirmed; but, on a subsequent day of the term, the affirmance was set aside, and a rehearing granted. At the July term, 1855, the cause was heard before Mr. Justice GOLDTHWAITE, sitting alone, as the other two judges of the court were incompetent to sit; and he, being of opinion that the judgment ought to be reversed, certified the facts to the governor for the summoning of a special court. On the 16th July, 1855, the special court convened, heard the cause, and held it under advisement until the 10th January, 1856, when a judgment was rendered, reversing the judgment of the circuit court, and remanding the cause. On the 14th January, 1856, in the absence of one of the circuit court judges, the other two judges of the special court set aside the judgment of reversal, granted a rehearing, and ordered the cause to be placed back on the regular docket. At the June term, 1856, of the supreme court, the cause was heard before Mr. Justice STONE, (who had succeeded Mr. Justice GOLDTHWAITE,) sitting alone; and the judgment of the circuit court was by him affirmed. The defendants afterwards filed a bill in chancery, to enjoin the judgment; but their bill was dismissed by the chancellor, for want of equity; and his decree was affirmed by the supreme court, on appeal, on the 2d April, 1858. On the 14th of April, 1858, the clerk of the circuit court issued an execution on the original judgment, against Goodman & Mitchell, with James S. Mitchell, their surety on the appeal bond, and James E. Reese, their surety on the injunction

tion bond in the chancery suit; and this is the execution which the appellants sought to supersede and quash. The plaintiff in the execution made a motion to amend it, by striking out the name of James E. Reese; and the two motions were heard together. The court granted the plaintiff's motion to amend, refused the defendants' motion to quash the execution, and dismissed their petition; and its judgment, in each of these particulars, is now assigned as error.

L. E. PARSONS, for the appellants.

GOLDTHWAITE, RICE & SEMPLÉ, with whom was J. FALKNER, *contra*.

R. W. WALKER, J.—The principal question for our consideration is as to the jurisdiction of Judge STONE to try and decide the case under the circumstances disclosed by the record.

Section 573 of the Code relates to cases in the supreme court, in which two of the judges are disqualified from sitting, and is in the following words: "In any cause or proceeding in said court, when any two of the judges are disqualified from sitting, the other judge must hear such cause, and, if of the opinion that the judgment should be affirmed, his judgment is of the same force and effect as if it were the judgment of a majority of the court; but, if of opinion that the judgment should be reversed, he must certify the same to the governor, who must associate with him two circuit judges, or two chancellors, for the decision of such cause; and such three judges must hear and determine the same."

The proceeding authorized by this section is a special statutory proceeding, and the statute must be strictly pursued. The decision of no case can be effected in the special mode here provided, unless two of the judges of the supreme court are disqualified from sitting, and the remaining judge has certified to the governor his opinion that the judgment should be reversed. When his certificate is given,

it is made the duty of the governor to *associate with* the judge giving the same two circuit judges, or two chancellors, for the decision of the cause. The reason for the issuing of the commission is the fact that there is but one judge of the supreme court qualified to sit, and that he has certified that, in his opinion, the judgment should be reversed. When the reason on which the grant of authority is founded ceases, it would seem that the authority itself should terminate. Moreover, the two circuit judges or chancellors are *associated with* a judge of the supreme court who has given the required certificate. That is to say, the tribunal created by the statute is to consist of a judge of the supreme court, aided by two circuit judges, or chancellors; and we think it is clear, that if the judge of the supreme court goes out of office before the decision of the cause, his authority over it is, *ipso facto*, at an end, and when his authority ceases, that of the two circuit judges, or chancellors, associated with him, must also cease. Their authority is purely auxiliary, in aid of the authority of the supreme court judge who is qualified to sit; and when, by his ceasing to be such judge, his authority comes to an end, the merely dependent and auxiliary authority of his associates must also cease.

In the present case, when the order granting a rehearing was made by the special court, that court directed that "the cause be placed back on the regular docket," and then adjourned *sine die*. During the succeeding term, and before any further step was taken in the cause, Judge GOLDTHWAITE, upon whose certificate the special court had been summoned, resigned his seat upon the bench, and Judge STONE succeeded him. There was then a judge upon the bench, qualified to sit in the cause, who had never certified that in his opinion the judgment should be reversed. The judge who had given such a certificate having ceased to be a judge, thereby ending his authority over the cause, and having been succeeded by another judge who was qualified to sit, but who had not given the certificate required by law, the reason on which the grant of

authority to the special judges had been founded, was destroyed, and the same became inoperative.

This will be rendered more clear, if we suppose that one of the other judges had resigned at the same time with Judge GOLDTHWAITE, and had been succeeded by a judge, who, like Judge STONE, was qualified to sit in the cause. There would then have been two judges of the supreme court competent to hear and decide the case. Or we may suppose that both of the other judges had resigned with Judge GOLDTHWAITE, and that their successors were qualified to sit in the cause. There would then have been a full court competent to try the case. Could it be pretended that, in either of the cases we have supposed, the authority of the persons named in the governor's commission would still continue, and that a judgment rendered by two judges of the supreme court qualified to sit, or even by a full court of three judges, would be void for want of jurisdiction? In principle, there can be no difference between the cases supposed, and the one before us.

The authority of the special judges having been terminated by the resignation of Judge GOLDTHWAITE, the case stood like any other case on the docket. Judge STONE being the only judge qualified to sit it was his duty to hear the cause; and as he was of the opinion that the judgment should be affirmed, his judgment of affirmance "is of the same force and effect as if it were the judgment of a majority of the court."—Code, § 573.

2. There was no error in amending the execution, so as to make it conform to the judgment.

Judgment affirmed.

A. J. WALKER, C. J., not sitting.

WHITE vs. MASTIN.

[ACTION FOR VALUE OF MEDICAL SERVICES RENDERED.]

1. *Proof of medical license.*—Under section 975 of the Code, a medical license is competent evidence, without proof of the signatures attached to it.
2. *Proof of special contract with physician.*—In an action to recover for the value of medical services rendered by plaintiff to a third person, it is permissible for him to prove that, although he did not begin, he continued his services at the instance and request of the defendant; and, for this purpose, he may show that, when he spoke of discontinuing his visits, a telegraphic dispatch and a letter from defendant, requesting that all necessary attention be bestowed on the patient at his expense, were shown to him by the person who had received them, and who then requested him to continue his attendance.
3. *Same.*—In such case, defendant's dispatch being addressed to the infirmary at which the patient was confined, but authorizing the employment of persons not connected with the infirmary to perform necessary services for the patient, the fact that the defendant has paid the account contracted with the infirmary, which did not embrace the plaintiff's account, is irrelevant and inadmissible.
4. *Construction of special contract, evidenced by telegraphic dispatch.*—A telegraphic dispatch, sent by the defendant to an infirmary at which a patient is confined, in these words: "I have just learned of D's accident; show him every attention, and I will pay expenses"—authorizes the infirmary to procure for the patient any medical services that may be necessary, and obliges the defendant to pay the person by whom such services are rendered, although he may not be connected with the infirmary.
5. *Letter construed as authorizing employment of physician, and making writer liable as original promisor.*—Defendant having sent a telegraphic dispatch to an infirmary, requesting that all necessary attention might be bestowed, at his expense, on a patient therein confined by an accident; a letter, written by him two days afterwards, addressed to the person by whom his dispatch was answered, and containing these words, "May I not rely on your providing for D. as you or his attending physician may think best"—confers on the person to whom it is addressed authority to employ, at the expense of the defendant, such physician as he might think best, and renders the defendant liable, as on an original promise, for the services rendered by such physician.
6. *Contract between physician and patient.*—There is nothing in the ordinary relation between a physician and his patient, which prevents him from discontinuing his services at the instance of the patient, and entering into a contract with another person for the payment of the charges for his future services; nor is the assent of the patient to such new contract necessary.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Claudius H. Mastin, against Clement B. White, to recover the value of services and attention rendered and bestowed by the plaintiff, as a physician, at the special instance and request of the defendant, to and upon one David Lumpkin; the amount of the account being \$309. The defendant pleaded, "in short by consent, the general issue, and the statute of frauds"; and issue was joined on these pleas. On the trial, as appears from the bill of exceptions, the plaintiff produced his license to practice as a physician, as required by written notice on the part of the defendant. The defendant objected to its admission as evidence, "because no sufficient proof of its execution had been made." The court overruled the objection, and the defendant excepted.

The material facts of the case, as disclosed by the evidence, are these: Lumpkin was thrown from a buggy, in the city of Mobile, in September, 1857, and severely injured; and was carried to the "Providence Infirmary", where he was immediately attended by the plaintiff and another physician. On the 15th September, 1857, the defendant, who lived in Selma, sent a telegraphic dispatch to the infirmary, in these words: "I have just learned of David Lumpkin's accident. Show him every attention, and I will pay expenses. He is my cousin. Telegraph how he is." The matron in charge of the infirmary, on receiving this dispatch, sent it to one Batchelor, and requested him to answer it; and Batchelor accordingly did so. On the 17th September, 1857, the defendant wrote and forwarded to Batchelor a letter, in these words: "I received your dispatch yesterday, and regret that you speak so discouragingly of David's recovery. I would go down immediately and see him, were it not that, owing to the sickness of my partner and clerks, I am entirely alone, and heavy freights arriving. Should Mr. H. get well enough, I will come down on the next boat. But, if I am disap-

pointed in so doing, may I not rely on your providing for David as you or his attending physician may think best. I dislike the idea of his being in an infirmary, but presume that, being alone in a large city, away from his relations, it is best. Will you please telegraph me every day of his condition ; and if he should express any desire to have me come down, I will do so." The letter and dispatch were both shown by Batchelor to the plaintiff, who continued his attendance on Lumpkin, and afterwards amputated one of his legs.

The plaintiff read in evidence the deposition of Batchelor, whose answer to the second interrogatory was as follows : "Dr. C. H. Mastin attended Lumpkin. Doctors Fearn and Mastin first went to his aid, before any specific employment, to my knowledge, was made ; from motives of humanity, it may be, until his friends could come to his relief. Dr. Fearn discontinued his services after the first examination. Dr. Mastin continued with him, and went out with him to the hospital, or infirmary, on the night of the accident. In a short time after the injury, the annexed dispatch, marked 'A', was received by the infirmary, and was immediately sent to me by the sisters of charity, to answer, at the request of Lumpkin, as will be seen by the note on the back of the dispatch. I immediately telegraphed to Mr. C. B. White, as requested, and received from him, in reply, the letter marked 'B'. I gave the letter and dispatch to Dr. Mastin, and it was in consequence of them that he continued his attendance on Lumpkin. It was after the receipt of the letter and dispatch that he performed the operation of amputating Lumpkin's leg, which was considered necessary to save his life. I am satisfied from the conversations I had with Dr. Mastin, that, if it had not been for the said letter and dispatch, he would have discontinued his attendance on Lumpkin, as the case was one requiring much care, attention and watchfulness, and he did not feel justified in continuing without some chance of compensation. Before the operation, and a short time after the injury, *Dr. Mastin spoke of discontinuing his*

visits to Lumpkin ; but, on my handing him the letter and dispatch of Mr. White, and understanding that he was able to pay, continued his attendance, I requesting him to do so". The defendant objected to the admission of the italicized portions of this answer, and reserved exceptions to the overruling of his objections.

The defendant offered evidence showing that there was a physician in the regular employment of the infirmary where Lumpkin was confined, whose duty it was to attend on all the patients ; also, a receipt showing that he had paid to the infirmary, in June, 1858, the sum of \$307, "in full satisfaction of all claim of the Providence Infirmary for attention rendered to David P. Lumpkin while confined as an inmate thereof, and for expenses incurred for him." On the plaintiff's motion, the court excluded the receipt, together with all the evidence relating to it ; to which ruling the defendant excepted.

On the evidence adduced, all of which is set out in the bill of exceptions, the defendant requested the court to charge the jury as follows :

"1. That the telegraphic dispatch was only an undertaking to pay the Providence Infirmary, and did not make the defendant liable to a person who was outside of, and had no connection with that institution.

"2. That the letter read in evidence does not impose a liability on the defendant, in favor of the plaintiff in this action, for services rendered to Lumpkin, unless the defendant was notified that plaintiff had acceded to the proposal in the letter, and was rendering services to him on the faith of that proposal.

"3. That if plaintiff began his attention and services to Lumpkin on the 9th September, and did not know anything of the defendant until the 15th, and no letter or undertaking by the defendant to pay for services, or any request to render services, (?) and continued to render his services, and gave his attention as he was doing before,—then Lumpkin was liable for such services ; and if Lumpkin was liable, then the defendant was not liable.

"4. That if the plaintiff began his services as physician to Lumpkin on the 9th September, at the request of Lumpkin, and did not know anything of the defendant until the 15th September; and there was no second agreement or understanding between plaintiff and said Lumpkin, after the dispatch read in evidence, or after the letter, but the plaintiff continued his services just as he had done before, and until finally discontinued by him, then the defendant is not liable to him for such services".

The court refused each of these charges, and the defendant excepted to their refusal; and he now assigns as error the rulings of the court on the evidence, with the refusal of the charges asked.

WHITE & PORTIS, for appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—1. The objection to the plaintiff's medical license was not well taken, and does not seem to be now insisted on. The Code (§ 975) made the license competent evidence, without proof of the signatures.

[2.] The plaintiff had been attending upon Lumpkin before the dispatch and letter from the defendant were shown to him. It was permissible for him to show that his services afterwards were rendered under the employment of the defendant. For that purpose, the parts of the answer of the witness Batchelor to the second interrogatory to which objection was made, were admissible. The witness, in saying that the plaintiff spoke of discontinuing his visits, does not give a conclusion from what was said, but states the substance of the declaration; and the declaration was admissible, because it was a part of the *res gestæ*. We think that the witness uses the word "understanding" in the sense of learning. The whole evidence objected to means nothing more than this. The plaintiff spoke of discontinuing his visits; the witness showed him the dispatch and letter; the plaintiff was told the defendant was able to

pay; and the witness requested him to continue his attendance, and he did so. The evidence seems all to belong to a transaction bearing directly upon the material question of the case, and was admissible. The objection, that the dispatch and letter exhibited with the deposition of Batchelor were not identified by the commissioner, is not sustained by the record.

[3.] The receipt of the Providence Infirmary, and the evidence offered in connection with it, were properly excluded. The entire matter was irrelevant. It showed a compliance on the part of the defendant with his contract with the infirmary; but it could cast no light upon the question, whether the defendant was the debtor of the plaintiff. There was no proposition to show that the plaintiff's debt was embraced in the account to which the receipt pertained. Indeed, the contrary is shown by the record.

[4.] The first charge requested, to the effect that the telegraphic dispatch did not import an obligation to pay any person unconnected with the infirmary, presented, as we think, too narrow a view of that instrument. The telegraphic dispatch requests the infirmary to show to Mr. Lumpkin every attention, and proposes to pay expenses. This proposition to pay expenses is accompanied with the announcement, that the defendant had just learned of the accident to Mr. Lumpkin, which made him a subject for nursing as well as medical and surgical treatment. The dispatch is, therefore, to be construed in reference to the condition of Mr. L.; and we think it must be regarded as authorizing the procurement by the infirmary, for the wounded man, of whatever his situation made necessary, although it might be supplied by a person not connected with the infirmary, and as obligating the defendant to pay the person furnishing the same. The charge was, therefore, properly refused.

[5.] In a letter written two days after the telegram, and addressed to Batchelor, the defendant, after speaking upon the subject of his going to Mobile, where Mr. Lumpkin

was, said: "But, if disappointed in so doing, may I not rely upon your providing for David as you or his attending physician may think best." This letter, when considered in reference to the contents of the telegram, which had been handed to Batchelor, and by him answered, must be understood to confer authority upon Batchelor to secure the attendance of such physician as he thought "best," at the expense of the defendant. This letter was not a guaranty of such account as might be contracted for Lumpkin's benefit, nor was it an authority to Batchelor to guaranty such debt. It was an authority to Batchelor to act for the defendant in the procurement of necessities; and the defendant's liability upon the plaintiff's account was original. The law of guaranty has nothing to do with the case, and the second charge asked was properly refused.

[6.] Although the plaintiff may, at the outset, have rendered his services solely on Lumpkin's responsibility, he was not bound to continue his services in the same way. He had made no special contract, which would have been broken by the cessation of his services. There is nothing in the ordinary relation between a physician and his patient, which would prevent the former from discontinuing his services upon the account of the latter, and entering into a contract with another for the payment of the charges for his subsequent attendance. We perceive no reason why the assent of the patient to the making of such a contract should be necessary. There was, therefore, no error in the refusal of the third and fourth charges requested.

Affirmed.

WHITE *vs.* EASTER.

[BILL IN EQUITY BY EXECUTOR FOR ABATEMENT OF LEGACIES.]

1. *Abatement of specific and residuary legacies.*—An executor, who is also residuary legatee under the will, cannot maintain a bill in equity against the specific legatees, for an abatement of their legacies, on account of expenses incurred by him after paying their legacies in full, when it appears that he has received, as residuary legatee, more than the entire amount of the expenses so incurred, and that he voluntarily paid the specific legacies without requiring refunding bonds from the legatees.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed by Wilborn C. White, the appellant, who was the executor of the last will and testament of John White, deceased, and also the residuary legatee under the will, against Mrs. Sarah Easters and others, who were also legatees under the will. Its object was to compel the defendants to refund to the complainant, from the amounts which he had paid to them in satisfaction of their respective legacies, their *pro-rata* share of expenses subsequently incurred by him in defending a chancery suit, the object of which was to set aside the probate of the will. The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

C. CUNNINGHAM, for appellant.

STONE, J.—The will of John White, out of which this litigation arises, is made up entirely of specific legacies of considerable value, a few inconsiderable pecuniary legacies of ten dollars each, and a residuary clause in favor of Wilborn C. White, who was appointed executor. The complainant seeks to have the specific legatees refund to him, because, as he avers, after he had assented to the legacies

and given them off, suits were instituted against him as executor, which he has defended successfully; but, in defending them, he alleges that he has been required to pay out large sums of money; and to devote his personal attention, for which he seeks to recover some twenty-seven hundred to three thousand dollars.

We are informed by the exhibit to the bill, that the executor received, under the clause in his favor, the sum of about twenty-nine hundred dollars, being more than the sum he claims to have allowed him for the expenses of the after-litigation. The bill does not allege or claim that any greater sum should be paid the executor than the exhibit shows he has received as his legacy, and there is nothing in the bill or exhibit which enables us to determine what portion of the sum of \$2,987 54 accrued to the executor under the specific clause to him, and what portion under the residuary clause. This matter being left in doubt, we must construe the clause most strongly against the pleader. The averments of the bill are, that the executor has paid out money exceeding two thousand dollars, and that he and Mr. Siler have agreed on seven hundred dollars, as his compensation for commissions, and for personal services in superintending the litigation. These two amounts, added together, make up a sum exceeding twenty-seven hundred dollars; but how much they exceed that amount, we are not informed. The bill, then, fails to show that the complainant is entitled to receive a greater sum than has accrued to him as residuary legatee.

In the most favorable aspect in which we can view this case, it is a bill by a residuary legatee, against specific legatees, to obtain from the latter a *pro-rata* abatement of their legacies for the payment of debts. The rule is clear, beyond all question, that specific legacies are not subject to abatement, until the residuary legacy is exhausted.—White & Tudor's Leading Cases, (3d edition,) pages 500-505; 1 Roper on Legacies, 356-7, 410-11; Lomax on Ex'rs, (2d edition,) 304-7.

The bill failing to present a case for abatement of the

specific legacies, even if the property had remained in the hands of the executor undistributed, we need not inquire of another very grave question in this case—namely, whether the executor, after voluntarily surrendering the legacies, without requiring refunding bonds, has made a case which authorizes him to call for contribution. On this question we decide nothing.—See *Alexander v. Fisher*, 18 Ala. 374; *Moore v. Lesueur*, 33 Ala. 237–245.

The decree of the chancellor must be affirmed.

LOTT vs. ROSS & CO.

[BILL IN EQUITY TO ENJOIN COLLECTION OF SPECIAL TAX.]

1. *Statutory power of corporation to levy special tax.*—A grant of power to a corporation to levy a special tax must be strictly construed, and any doubtful question as to the extent of the power must be decided against the corporation.
2. *Construction of statute authorizing special tax for improvement of bay and harbor of Mobile.*—The 5th section of the act approved February 21, 1860, entitled "An act for the improvement of the bay and harbor of Mobile," (Session Acts 1859, p. 538,) which authorizes the assessment and collection of a special tax, "not exceeding twenty cents upon each hundred dollars of taxable property within said county," does not authorize the imposition of a tax on the gross amount of sales of merchandise.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. N. W. COCKE.

The bill in this case was filed by W. H. Ross & Co., against Elisha B. Lott, who was the tax-collector of Mobile county, for the purpose of enjoining the collection by the defendant of a special tax, which was levied under the act approved February 21st, 1860, entitled "An act for the improvement of the bay and harbor of Mobile." The complainants were wholesale and retail grocers in the city.

of Mobile, and the tax which the defendant was seeking to collect was twenty per cent. on the gross amount of sales of merchandise made by them during the tax year. The cause was submitted to the chancellor on an agreed statement of facts, on which he rendered a decree, perpetually enjoining the collection of the tax complained of; and his decree is now assigned as error.

A. R. MANNING, and ALEX. MCKINSTRY, for appellant.

J. L. SMITH, *contra*.

R. W. WALKER, J.—By the 4th section of the act “for the improvement of the bay and harbor of Mobile,” and in order to aid the board of harbor commissioners in the performance of its powers and duties under that act, the president and commissioners of revenue for the county of Mobile were authorized to issue county bonds, to an amount not exceeding \$800,000; and by the 5th section it was provided, “that for the purpose of giving credit to said bonds, and providing the means of paying the interest upon them, and meeting the principal thereof, said president and commissioners of revenue shall cause to be assessed and collected from the county of Mobile, for a term not exceeding ten years, an annual tax not exceeding twenty cents upon each hundred dollars of taxable property within said county, with the assessing of which the tax-assessor, who now is or may be for said county of Mobile, shall be charged, under such obligations, liabilities, and duties, as are now, or may hereafter by law be imposed, for assessing the ordinary taxes for said county; and said tax shall be collected by the officer that now is, or by law may be, charged with the collection of taxes for said county of Mobile; * * * * * and said tax-collector shall be liable for and in respect to the same, or for neglecting to collect the same, in the same manner, and to the same extent, that he now is, or by law may be, for and on account of the ordinary taxes for said county.”—Acts ’59–60, p. 538.

The only question for us to decide is, whether the au-

thority to assess and collect a tax, "*not exceeding twenty cents upon each hundred dollars of taxable property within said county,*" conferred the power to levy a tax of twenty cents upon each hundred dollars of the gross amount of sales of merchandise made by the appellees during the tax year. In ascertaining what is taxable property under this act, it is undoubtably proper to look to the general tax laws of the State. Whatever 'property within the county of Mobile' is subject to taxation under those laws, is liable to be taxed under this act; and the converse of the proposition is also true.—*City of Buffalo v. Leconteulx*, 15 New York, 451; *City of Richmond v. Daniel*, 14 Gratt. 385; 10 Wend. 186. But it by no means follows, that every *subject* of taxation, under the State laws, can be considered as embraced by the terms "taxable property" employed in this act. Under the Code, there are many *subjects* of taxation, which are not property, nor taxed as property. The poll-tax, the tax on free negroes, and the large class of license taxes, are illustrations of this. Section 391 of the Code begins with the provision, that "taxes are to be assessed by the assessor in each county, on and from the following *subjects*, and at the following rates;" and the distinction between *property* made liable to taxes, and other *subjects* of taxation, is clearly drawn in various sections of the Code; (see § 371, sub-divisions 1, 2, 3, 17, 18, 31; §§ 397, 403, 423, subdivision 2; §§ 429, 432, 443-4,) and in the subsequent legislation of the State.—See Acts 1853-4, pp. 3-4, §§ 2, 5.

The Code provides, that "there shall be assessed on the gross amount of sales, in or during such tax year, of merchandise, fruit, or confectionary, or any article or commodity not herein specially taxed, made by any person engaged in the business of selling; on each hundred dollars, and at that rate, twenty cents."—Code, § 391, subdivision 22. But, as we have seen, the mere fact that by the general law a tax is levied upon sales of merchandise, does not show that they are taxed as property. By the same law, taxes are to be collected "on each lecture to which en-

trance fees are charged," on "official seals," on "each suit in the supreme court," &c. (Code, §§ 395-6, 403, 407-8); and it will not be pretended that any of these are taxes on property.

The appellant must show, therefore, either that this tax upon sales of merchandise is a tax upon *property*, or that the word '*property*,' as employed in the act under consideration, is not to be understood in its usual sense, as designating what one is the owner or possessor of, but should be construed as synonymous with the more comprehensive word *subjects*. That the first of these propositions cannot be maintained, we consider too plain for argument. A tax upon "the gross amount of sales of merchandise", under section 391 of the Code, is not a tax upon the goods themselves, or the fruits of the sale, but upon the business or act of selling. This is not, then, a property or income tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed.—See *Mosely v. Tift*, 4 Florida, 402; *State v. Stephens*, 4 Texas, 137; *State v. Bock*, 9 Texas, 369; *De Witt v. Hays*, 2 Cal. 468; Code, § 392; Acts '53-4, p. 4, § 5; Acts '59-60, p. 12; *Nathan v. Louisiana*, 8 How. (U. S.) 80-1.

Nor are we able to decide that the words "taxable property" are here used in the sense of "taxables", or "taxable subjects," and not according to their ordinary signification, of things taxed which are the subject of ownership. Undoubtedly, the word '*property*' is sometimes employed in revenue laws in this larger sense of "subjects," and so embraces everything liable to taxation. Such will be the construction of the word wherever the context requires it, or wherever, if not so understood, the plain object of the law would be defeated. It was upon this principle that the case of *Carter v. Mercer* (9 Ala. 556) was decided; and upon the same principle, the word "property," as found in some of the sections of the Code relating to taxes, might be construed to embrace subjects of taxation, which are not property in the legal sense of that word.—See §§ 424, 426-7, 453.

But, as we have seen, the Code does, in numerous instances, draw a clear distinction between "property" taxed, and other subjects or items of taxation. And where the words 'taxable property' occur in an independent act, it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated if they are not held to cover subjects of taxation which are not property in the ordinary sense.

In the present case, we are unable to discover anything in the context, which requires us to wrest the words from their ordinary meaning; and certainly we cannot affirm, that the plain object of this law will be defeated if we do not interpret them in the larger sense contended for. The context shows, that the words cannot be construed to embrace all taxable subjects. The tax is to be assessed "upon each hundred dollars" of the things taxed; and as there is a large class of taxable subjects not susceptible of valuation, and of which a pecuniary amount is not predicable, such as the poll, licenses, professions, seals, suits, &c., it is obvious that we cannot understand the words as embracing everything subject to taxation under the general law.

On the other hand, the entire context is consistent with the idea, that '*property*' in its ordinary sense was all that was meant; and on that construction of the words, an ample field is allowed for the operation of the law, and none of the objects the legislature had in view, so far as they are disclosed by the terms of the act, are defeated. See *Mosely v. Tift*, 4 Florida, 402; *Johnson v. City of Lexington*, 14 B. Monroe, 648; *City of Richmond v. Daniel*, 14 Gratt. 385.

But, if there were a doubt upon the subject, it would be removed, when we remember that this is a grant of power, of a special and unusual character, to a subordinate body. No legal principle is more familiar, or more firmly

established, than that grants of power to a corporation, or other subordinate body, are to be construed strictly against such corporation or body. Without pausing to inquire whether there may not be exceptions to the general principle just stated, we are satisfied that, if there are any such, a grant of the power of taxation to county commissioners, in aid of an improvement outside of the county limits, is not one of them. The general rule of construction, governing grants to corporations, applies in all its vigor to such a case. According to that rule, the power claimed must be granted in plain words, or by necessary implication; or, as it is expressed by Chief-justice Black, "in the construction of every charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."—*Penn. R. R. Co. v. Canal Comm'rs*, 21 Penn. 9; *City of Richmond v. Daniel*, 14 Gratt. 386-9; *Grand Lodge v. Waddell*, June term, 1860; Sedgwick on Statutes, 466; *City Council v. Plankroad Co.*, 31 Ala. 83; *Nichol v. Mayor of Nashville*, 9 Humph. 262; *Kyle v. Malin*, 8 Ind. 34. If, therefore, there be a doubt about the extent of the power granted in this case, we must give the benefit of that doubt to the citizen whose property is sought to be subjected; and, lest the power may have a larger scope than was intended by the legislature, we must limit it within bounds which are so plainly embraced by the words of the grant as to be free from doubt.

On the whole, our conclusion is, that the tax was not authorized by the act under which it appears to have been levied.

Decree affirmed.

CITY COUNCIL OF MONTGOMERY vs. THE STATE,
EX REL. DICKERSON ET AL.

[BILL IN EQUITY TO ENJOIN COLLECTION OF SPECIAL TAX BY MUNICIPAL CORPORATION.]

1. *Construction of act of Feb. 24, 1860, authorizing city of Montgomery to aid South and North Alabama railroad.*—The act “to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad”, approved February 24, 1860, which authorizes the corporate authorities of said city, “in such manner as they may deem expedient, to take the sense of the holders of real estate in said city, upon the proposition to raise by tax upon real estate” a specified sum, to be invested in stock of said railroad company, requires that the sense of all the holders of real estate in the city shall be ascertained, by an expression of their wishes *per capita*, before the proposed tax can be levied: an election, held under an ordinance of the corporate authorities, by which it is provided that the vote shall be taken *pro rata* according to the value of the real estate owned by the respective voters, “each voter being allowed one vote for every hundred dollars of assessed real estate owned by him”, is not a compliance with the terms of the act; and although it appears, from the register kept by the managers of the election, that, of all the persons who voted at such election, a majority in number voted for the tax, this does not cure the defect in holding the election on illegal principles, which may have prevented persons from voting.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed in the name of the State, on the relation of L. H. Dickerson, Thos. O. Glasscock, and others, citizens and owners of real estate in the city of Montgomery, against the corporate authorities of said city, to enjoin and restrain the collection of a special tax, which the defendants had assessed, and were about to collect, under the authority of an act of the legislature, and an election held under the authority supposed to be conferred by that act. The act referred to may be found in the Session Acts of 1859–60, (pp. 193–4,) and is in the following words :

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“AN ACT to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad.”
Approved February 24, 1860.

“*Section 1. Be it enacted*”, &c., “That the municipal authorities of the city of Montgomery are hereby authorized, in such manner as they may deem expedient, to take the sense of the holders of real estate in said city upon the proposition to raise by tax upon real estate, not to exceed two per cent. *per annum*, the sum of three hundred thousand dollars, to be invested in stock of the South and North Alabama Railroad Company.

“*Section 2. Be it further enacted*, That if the holders of real estate shall decide in favor of the said tax, it shall then be lawful for the said city authorities to prescribe and direct the manner in which scrip shall be issued to the persons taxed, as evidence of the amount of taxes paid by them; which said scrip shall be convertible into stock of said road, under such rules and regulations as the said railroad company may prescribe.

“*Section 3. Be it further enacted*, That any real-estate owner shall have the right to prepay his taxes for two or more years at his pleasure, taking the existing assessment as the basis, and shall be allowed a reduction, upon the principles of discount that prevail in banking operations; on making any prepayment, and be entitled to scrip accordingly.

“*Section 4. Be it further enacted*, That all laws repugnant to the provisions of this act are hereby repealed.”

To carry out the provisions of this act, and to ascertain the sense of the holders of real estate in the city on the proposed tax, the corporate authorities of the city, on the 19th March, 1860, adopted certain resolutions, providing for the holding of an election; and the mayor of the city, by an advertisement published in the city newspapers, gave notice of the intended election. The said resolutions and advertisement were in these words:

“*Whereas*, the legislature of Alabama, at its recent session, passed an act relative to aiding the South and North

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Alabama railroad, which law requires action of the city council to make it binding and of full force: *Therefore be it resolved,*

"1. That the mayor be authorized to issue his proclamation for an election of the real-estate owners of this city, to be held on Saturday, the 31st inst., to decide *pro* or *con.* the question of taxation by the city for the benefit of the South and North Alabama railroad, as *per* the recent act of the legislature, entitled "An act to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad".

"2. That all real-estate owners, residents or otherwise, of the age of twenty-one years, shall be entitled to vote in said election, in person, or by proxy; and all minors, owning real estate within the city, shall be represented by their respective guardians, voting in their stead; and the administrator, executor, or executrix of any estate, shall be entitled to vote on the real estate they represent in trust.

"3. That the vote in said election shall be taken *pro rata*, according to the present assessed value of the real estate each voter may own; each voter being allowed one vote for every one hundred dollars of assessed real estate owned by such voter; and if said election shall decide in favor of this tax, then the city council is authorized and hereby instructed to levy the full tax of two per cent. *per annum* on all real estate, in accordance with, and for the speedy promotion of the end for which said act was passed."

"RAILROAD TAX."

"Notice is hereby given, that an election will be held at the court-house, on Saturday, the 31st instant, under the management of I. W. Roberts, B. R. Jones, and W. P. Vanderveer, to take the sense of the owners of real estate in the city of Montgomery, upon the proposition to raise by tax upon real estate the sum of three hundred thousand dollars, to be invested in stock of the South and North Alabama Railroad Company. The election will commence at 9 o'clock *a. m.*, and close at 4 o'clock, *p. m.*; and will,

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in all respects, be governed by the regulations prescribed in the following preamble and resolutions, adopted by the city council on the 19th instant."

(Signed by the mayor, and dated March 20, 1860.)

The election was held on the appointed day. The managers reported, "that thirty thousand seven hundred and thirty-four votes were cast in favor of taxation, and six thousand four hundred and thirty votes against taxation"; and their return contained a list of the names of the persons who voted, and the number of votes cast by each in his own right, or as agent, guardian, &c., showing that two hundred and forty-three persons voted for the tax, in person or by proxy, while one hundred and two voted against it. The city council passed resolutions, a few days after this election was had, providing for the prompt payment and collection of the tax. The bill sought to enjoin the collection of the tax, on the ground that the election was not held in accordance with the requirements of the act of the legislature, and that the act itself was unconstitutional and void. The defendants filed an answer, admitting all the facts alleged in the bill, as above stated, and insisting on the validity of the act and proceedings under which they were seeking to collect the tax; and they also demurred to the bill, for want of equity. The chancellor overruled the demurrer, and, on final hearing, rendered a decree for the complainant; and his decree is now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellants.

JNO. A. ELMORE, and JOS. S. WINTER, *contra*.

A. J. WALKER, C. J.—It is certain that the taking "of the sense of the holders of real estate" in the city of Montgomery was an indispensable condition precedent to the power of taxation by the corporation of that city, under the act approved 24th February, 1860.—Pamphlet Acts of '59-60, page 193. The corporation had no authority to

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tax, until it was sanctioned by the sense of the holders of real estate, taken "as required by the law." The want or absence of this preliminary step is a complete negation of the power to tax. The power was dependent, not upon the fact that the sense of the real-estate holders favored its exercise, however clearly that fact might be now proved, but upon the condition, that such "sense" had been *taken*, and that the expression of it was in favor of the power. It is, therefore, not necessary for those who assail the tax imposed, to show that the sense of the real-estate holders was opposed to the tax. The want of power to levy the tax is shown, whenever it appears that the condition precedent was not performed. The equity of the complainant's bill is maintained, if it is averred and proved, that the imposition of the tax was not preceded by, and based upon, the requisite preliminary step.

The bill avers, that a certain ordinance, consisting of three sections, was passed by the city council; that, in pursuance of that ordinance, an election was held; and that the city council, acting on the presumption that the election was legal and the sense of the holders of real estate in favor of the tax, proceeded to collect the tax. We think it thus appears with reasonable certainty, that the election in pursuance of the ordinance was the thing done upon which the city council predicated its authority to levy the tax, and relied as a fulfillment of the condition precedent. To intend against the pleader that something else was done, which amounted to a taking of the sense of the real-estate holders, would be extending the intendments against the pleader with unreasonable severity. If, then, the election, held in pursuance of the ordinance above named, was not, within the meaning of the statute, a taking of the sense of the real-estate holders in the city, the absence of the necessary condition precedent to the exercise of the power of taxation is averred, and the tax is illegal. Therefore, the equity of the bill hinges upon the question, whether the sense of the proper class of persons was taken by the election. The right to relief

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upon the proof depends upon the same question; and the treatment of the question as it arises upon the proof will only be varied so far as to bring to view some new facts, giving rise to additional questions urged on the part of the defendapt. A consideration of the case upon the proof will, therefore, comprehend all the points to be decided. We will, therefore, proceed to inquire, whether the city council have taken the sense of the real-estate holders, looking to the facts alleged in the bill, and the other material facts proved.

Authority is given by the first section of the act of 1860 to the municipal authorities of the city of Montgomery, "in such manner as they may deem expedient, to take the sense of the holders of real estate in said city, upon the proposition to raise by tax upon real estate, not to exceed two per cent. *per annum*, the sum of three hundred thousand dollars," &c. The expression "holders of real estate" is descriptive of the persons whose sense was to be taken. It includes all persons who were in fact holders of real estate. The sense of those persons could only be determined by an expression of their wishes *per capita*. It could not be determined by the result of an election where each individual was allowed a vote for each hundred dollars in value of his real estate. If it could, we might have the absurdity of an expression of the sense of a thousand holders of real estate, by the votes of a hundred of the number, who happened to own more land in value than all the rest. The authority given was to take the sense of the individuals who belonged to the particular class of persons, on terms of equality, without any discrimination based upon the value of real estate owned. An enlarged discretion as to the manner of taking "the sense" is certainly given; and that may authorize a regulation as to whether the vote should be *viva voce* or by ballot, and as to the places and time of voting, and, perhaps, as to whether an election should be held, or the votes privately gathered by an appointed agent. There are, doubtless, other matters which fall within the scope of the discretionary control over the manner of tak-

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ing "the sense." But that control extends to the manner. It cannot justify any discrimination among the persons belonging to the particular class. The sense of that class is to be taken, and the discretion is confined to the manner in which that thing is to be done.

By the third section of the ordinance of the city council already noticed, it was directed, that the vote should be taken *pro rata*, according to the assessed value of the real estate of the respective voters, (each having one vote for every hundred dollars in value of his real estate,) and that the tax should be levied if the decision by the election so held should be in favor of it. The decision at such an election, by a majority of votes in favor of the tax, would only indicate that the persons who owned a major portion in value of the real estate were in favor of the tax—not that the sense of a majority of the persons who composed the class described as holders of real estate was in favor of it. Understanding the import of the expression in reference to taking the sense of the real-estate holders as has been above stated, we must decide, that such an election would not be a taking of the sense of such persons. Therefore, the bill, in showing that the tax was levied in presumption of the legality of such an election held in pursuance of the ordinance above stated, negatives the authority to impose the tax. Such an election, tested by the law in reference to which it was held, was illegal, and was no ascertainment of the sense of the designated class, and no fulfillment of the condition precedent prescribed by the statute.

The managers of the election registered the names of the different persons who voted at the election, and stated opposite to each name the number of votes cast, and the side upon which they were cast. It is contended for the appellant, that an inspection of the returns by the managers shows that a majority of the persons, counted *per capita*, who voted at the election, were in favor of the tax. We are not sure that the position is correct; but, conceding it to be so, it only establishes the fact, that a

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majority of the persons who voted were in favor of the tax. It falls far short of demonstrating that the sense of the holders of real estate in the city was taken, and that it was in favor of the tax. An election was, as we concede, a legal mode of taking the sense of the designated class of persons; and when a legal and properly appointed election is held, the sense of a majority of those who vote must be deemed the sense of a majority of those entitled to vote. Those who do not vote must be understood to consent to abide the decision of those who do.—Ang. & Ames on Corp. 114, § 127; Grant on Corp. 204; *First Parish in Sudbury v. Starns*, 21 Pick. 154; Wilcock on Corp. § 546; *Oldknow v. Wainwright*, 1 W. Bla. 229; *Rex v. Foxcroft*, 2 Burr. 1017. But this principle can only apply, when the election is legally proposed.—*Rex v. Monday*, 2 Cow. 530; Ang. & Ames on Corp., *supra*; Grant on Corp. 204–208; Wilcock on Corp. §§ 544, 545, 546.

We think it is a teaching of justice and reason, that where an election is authoritatively proposed to be held, upon principles which are illegal, and in derogation of the equality of suffrage, and which tend with reasonable certainty to prevent persons from voting, the sense of those who do vote cannot be taken to be the sense of all who are entitled to vote, and those who do not vote cannot be presumed to consent to abide the decision of those who do. Every one of the characteristics of such an election is found in the election which is under consideration. The announcement of the principles which should govern in the election was authoritative. It is not like the case of a mere ministerial officer announcing an intention to adopt some illegal regulation in the holding of an election. It is the case of a corporation, authorized at its election to take the sense of a certain class of persons, who had no opportunity to vote except as it might afforded by the corporation. The principle of a *pro-rata* vote, based upon the value of real estate, which we have already decided to be illegal, is clearly prescribed by the ordinance. The second section of the ordinance, which declares, in general terms, that all

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real-estate holders should be entitled to vote, is manifestly qualified by the third section, which requires that the vote shall be *pro rata*. The managers of the election, acting under the authority bestowed by the corporation, and as its ministerial agents, could not disregard the third section, and hold the election under the principle of the second, as it would have been understood in the absence of the third. If they had done so, they would have asserted the superiority of the agent over the principal; and it would have been an election held by them in violation of their instructions, and not an election held by the corporation through their agency. It would have been a taking of the sense of the prescribed class by the managers, and not by the corporation. The holding of the election upon the illegal plan of a *pro-rata* vote was a necessary result of the ordinance, which was promulgated in advance. This illegal principle had, as we think, an obvious tendency to influence persons not to vote. It is possible that the repulsive discrimination, predicated upon the value of real estate, may have prevented persons from voting. But, without laying stress upon that view, we think the knowledge that the votes would weigh according to the value of real property, would necessarily exert some control over the conviction of the voters as to the necessity and expediency of casting their votes, and consequently over their determination whether to vote or not.

Let an extreme case illustrate. If there were a community of a hundred persons, and ten out of the hundred held the major portion of the real estate, in such an election as we are considering, the ten could control the result; and the ninety, knowing their wishes, would be indifferent about voting. The tendency of such an influence in larger communities, with less difference in the amount of real estate owned by different individuals, would be less striking, but not less real. Besides these considerations, it is not at all certain that a careful reader of the ordinance and mayor's proclamation, which preceded the election, could determine, from either or both, that his preference as an in-

dividual would be at all indicated by the register kept by the managers of the election. Indeed, it seems to have been a matter altogether incidental to the main purpose of taking the vote *pro rata*, that any indication of the vote *per capita* was made. Is it then improbable, that persons detected the obvious illegality of the principle upon which the election was held, and, deeming such an election void, abstained from voting? At least, the tendency of such a knowledge would be to render them less careful to vote, and in that way to lessen the number of votes cast.

We have been referred to many decisions, by the counsel for the appellant, in which elections were held valid, notwithstanding many irregularities occurred; but, in those cases, the irregularities supervened pending the election, and were not such as influenced the result. They afford no analogy to the question involved in this case.

We do not deem it necessary to notice any of the other questions which have been argued. We do not wish, however, to be understood as affirming that all the other grounds, upon which the validity of the tax is assailed, are untenable. We avoid all expression of opinion upon them, both because it is unnecessary, and because one of the court does not sit in the case. A grave constitutional question has been raised and ably argued. Such a question it would be improper for us to decide, in the absence of a full court, unless it was necessary to do so.

Affirmed.

STONE, J., not sitting.

SPIVA vs. STAPLETON.

[ACTION TO RECOVER OVERSEER'S WAGES.]

1. *Opinion of witness as expert.*—In an action to recover stipulated wages as an overseer, the question being whether plaintiff performed his

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duty as an overseer, a witness who frequently saw the defendant's plantation while the plaintiff was in charge of it, and who is shown to have been an overseer for five or six years, may state that, in his opinion, plaintiff "managed pretty well."

2. *Proof of negligence by overseer.*—Defendant having adduced evidence showing that, during the year plaintiff was acting as overseer on his plantation, the supply of corn on the place was all consumed by June, he cannot be allowed to prove that, during the next year, under a different overseer, the number of persons, stock, &c., being the same as in the preceding year, the same quantity of corn lasted until September.
3. *Evidence rebutting proof of negligence.*—In such case, proof of the bad quality of the corn on the place when plaintiff took charge of it, would be competent evidence for him, in rebuttal; but proof of the bad quality of the corn raised in the neighborhood, unaccompanied with proof of any general cause affecting the crops of that neighborhood, or with evidence showing that, in quality of soil and mode of cultivation, defendant's plantation corresponded with the lands in the neighborhood generally, is too remote and uncertain to go to the jury for that purpose.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by John T. Stapleton, against Edward A. Spiva, to recover the sum of \$450, alleged to be due from defendant to plaintiff "for services rendered as an overseer during the year 1857"; also, the same amount, as "the price agreed to be paid by defendant to plaintiff for acting as overseer of his hands and plantation for the year 1857"; also, the same amount, "due by account on the 1st day of January, 1858, for work and labor done by plaintiff for defendant, at his request, during the year 1857." "The principal defense insisted on," as the bill of exceptions states, "was, that plaintiff had neglected his duty, and violated his contract, and had been discharged by defendant, for good cause, in August, 1857." The matters here assigned as error are the several rulings of the court below on the evidence, which are thus stated in the defendant's bill of exceptions:

"In proving performance on his part, plaintiff introduced a witness, who had been an overseer for five or six

years, and who testified, that he understood the business of an overseer, and that he frequently saw the defendant's plantation; and, in answer to a question by plaintiff, said, 'I think he (plaintiff) managed pretty well.' The defendant objected to this answer, as illegal and incompetent, and insisted, that the witness should state facts, and let the jury determine whether the plaintiff managed well or not, and moved to exclude said answer from the jury; but the court overruled his objection and motion, and the defendant excepted.

"There was proof tending to show that, when plaintiff went on defendant's plantation, there were some fifteen or sixteen hundred bushels of corn on the place; but there was a conflict of proof as to the quantity; and that one thousand bushels of corn was enough to do the place from January to September, when new corn would come in; but there was a conflict in the evidence, also, as to whether the corn on the place when the plaintiff went there was sufficient. There was proof, also, tending to show that the corn was out in June, and that defendant had to buy corn for his plantation in Mobile in June. It was shown that, when the plaintiff went on the place, the corn on it was in a crib and two rail pens, and that said crib and pens were then full. The number of white persons, negroes, mules, and other stock on the place, to be fed out of said corn in 1857, was also shown. Defendant offered to show that, in 1858, under another overseer, and with about the same number of persons, mules, stock, &c., the same crib held the corn fed to them during the year, and lasted until September; and that they were well fed, and had plenty. The court ruled out this evidence, on the plaintiff's objection; and the defendant excepted. Plaintiff introduced proof, also, showing that the bulk of corn, when put up in the shuck, as this was in 1857, was very deceptive, and that the actual quantity of corn—(?) On this point, plaintiff asked a witness, what was the quality of corn raised in the neighborhood of defendant's plantation in 1856; to which question the defendant objected, as illegal and in-

competent; but the court overruled his objection, and he excepted."

ALEX. & JNO. WHITE, for appellant.

BYRD & MORGAN, *contra*.

R. W. WALKER, J.—[1.] Construing the bill of exceptions most strongly against the appellant, we understand the statement, that the witness "saw the plantation frequently," to refer to the period when the plaintiff had charge of it. Placing this construction upon the bill of exceptions, the court did not err, in permitting the witness, who was shown to be an expert, to give his opinion that the plaintiff "managed pretty well."—*City Council v. Gitmer*, 33 Ala. 133; 1 Greenl. Ev. § 440; *McCreary v. Turk*, 29 Ala. 244.

[2.] The evidence that, in 1858, the same crib full of corn lasted the same number of persons, mules, stock, &c., until the month of September, was properly excluded. The value of such testimony as a basis for the presumption of carelessness or wastefulness on the part of the plaintiff, would depend on a number of collateral circumstances; such, for example, as the extent and condition of the pastures on the place in each year, the amount of other descriptions of forage used, the quality of the corn, &c., &c. An inquiry into these various matters would have led to an indefinite multiplication of the issues; and for this reason, if no other, the evidence was properly rejected.

[3.] Proof of the bad quality of the corn on the place when the plaintiff took charge, would have been competent evidence for him; and the testimony showing the quality of corn raised in the neighborhood in 1856, was doubtless offered with this view. For the purpose of raising the presumption, that the corn on the place when the plaintiff took charge was of bad quality, it is possible that testimony showing that the corn raised in 1856, in the neighborhood of said plantation, on lands of the same description and similarly cultivated, was generally of bad

quality, would have been admissible.—*Steele & Burgess v. Townsend*, 37 Ala. 247; *Johnson v. Lightsey*, 34 Ala. 173. But the testimony admitted was, in general terms, that the quality of corn raised in the neighborhood of the plantation in 1856, was bad; and this, we think, was too remote and uncertain to go to the jury, unaccompanied, as it was, by proof of any general cause affecting the crops of that neighborhood, or that, in respect of quality of soil and mode of cultivation, this particular plantation corresponded with the generality of the lands in the neighborhood. 1 Greenl. Ev. § 52; *Gilmer v. City Council*, 26 Ala. 669. Judgment reversed, and cause remanded.

DUMONT vs. RUEPPRECHT.

[BILL IN EQUITY FOR DISSOLUTION OF PARTNERSHIP.]

1. *Construction of articles of partnership*.—Where the articles of partnership provided, that the active partner should be entitled to one fourth of the net profits, and, if his share of the profits did not amount to \$3,000 at the end of any one year, that the other partner should pay him whatever sum might be necessary to make up that amount; that each partner might invest in the partnership, as capital, an amount not exceeding \$10,000, but should not draw out during the year, without the consent of his co-partner, any portion of the capital thus invested; that each might, from time to time, draw out of the moneys of the partnership, for his private use, a specified sum per month; and that the books should be balanced, and a balance-sheet made out, at the end of each year,—*held*, that the resident partner was entitled to receive \$3,000 at the end of each year, although the business of the year resulted in a loss to the firm; and that although he allowed his share of the profits, at the end of the first year, to remain to his credit on the books of the firm, it was not thereby invested in the partnership, but remained his private property, and might be used or withdrawn by him at any time.
2. *Dissolution of partnership; decreed as of what date*.—A court of equity, in decreeing the dissolution of a partnership, may declare at what date the contract shall be at an end; but it may be questioned, whether a mere violation of the articles of partnership by the defendant, not resulting in loss or injury, would make it proper for the court

to fix the date of the dissolution at an earlier day than the abandonment of the partnership by the aggrieved party; and where the only effect of a modification of the chancellor's decree, so as to make the dissolution take effect as of an earlier day, would be to deprive the defendant of the right to the compensation stipulated in the articles, and that compensation is shown to be a reasonable allowance for the services actually rendered by him, the appellate court will not disturb the decree.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. M. J. SAFFOLD.

THE bill in this case was filed, on the 19th April, 1859, by J. E. Dumont, against Albert Ruepprecht, asking the dissolution of a partnership which existed between the parties, and a settlement of the partnership accounts. The articles of partnership, the construction of which was in controversy, were in the following words:

"Memorandum for articles of partnership, to be entered into between J. E. Dumont and Albert von Ruepprecht, both of the city of Mobile. J. E. Dumont, general and commission-merchant in Mobile, in consideration of, and in reward for the faithful services rendered to his house by A. von Ruepprecht, hereby agrees to take A. von Ruepprecht into partnership, from the date of the 1st September next, for the term of four years, under the following conditions:

"The form or style of the firm [is] to be J. E. Dumont & Co. The business of said firm shall be carried on in the city of Mobile, and in such other ports as the partners may deem beneficial to their common interests. That A. von Ruepprecht shall be entitled to, and receive for his share, one-fourth of all the net profits of the firm, after all losses, charges, expenses, and doubtful debts, which may have been incurred, and are incidental to the business, have been properly deducted. In case A. von Ruepprecht's share in the net profits, as above mentioned, should not amount to \$3,000, (say three thousand dollars,) at the close of each year, then J. E. Dumont agrees to pay said von Ruepprecht such sum as may be required to make up the

above amount of \$3,000. Each partner is to be at liberty to invest into the stock of the concern a capital not exceeding \$10,000, say ten thousand dollars; such sums bearing interest, at the rate of eight per cent. *per annum*, to the credit of the respective partners. If any of the partners should wish to withdraw the whole or part of his capital out of the concern, his intention is to be made known to the other partner six months previous to such withdrawal, and must have received the consent of the other partner thereto in writing. Each of the partners shall be at liberty, from time to time, to draw out of the moneys of the partnership any sum or sums, not exceeding the sum of \$200, (say two hundred dollars,) for his own private use every month. That each of the partners will diligently employ himself in the business of said firm of copartnership, and be faithful to the other in all transactions relating to the same, and give a due account of the same, and all letters and things which may come to his hands or knowledge concerning the said partnership, to the other, as the same shall be required.

"It is understood and agreed between the partners, that J. E. Dumont is about to proceed to Europe, for the purpose of promoting by his personal exertions the interests and welfare of the firm by all legitimate means; such as travelling, and soliciting orders for cotton from the various friends of the firm; to form new connections for the same; to establish special agencies where they may be established of advantage—in fact, to do all things which he may judge requisite for the interests of the firm. J. E. Dumont, during his absence from Mobile, and travelling in Europe for the benefit of the house, shall be allowed and credited \$800 (say eight hundred dollars) a year, as a contribution to his travelling expenses; the same to be charged to the general expense account. A. von Ruepprecht agrees to remain at the place of business in Mobile, except the months of July, August, and September, and undertake the management and direction of the affairs of the house in all its branches, and use his best efforts and discretion in

sustaining and extending the credit and good name of the firm. Should Mr. Ruepprecht be desirous to make a trip to Europe in 1857 or 1858, during the summer months (from end of May to end of September), he is at liberty to do so, if it can be done without injury to the mutual interests of the partners.

“Neither of the partners shall, by himself, or with any other person or persons, either directly or indirectly, engage in any business, except the business of the partnership; and neither of them shall employ any of the moneys or effects of the said partnership, or engage the credit thereof, except on account and for the benefit of the partnership; and neither of them will give bond, or go bail, nor endorse, or become security in any manner, for any person or persons whatsoever. The books of account of said partnership shall be kept by double entry, and shall contain a full record of all the moneys, goods, effects, debts, sales, purchases, receipts, payments, and all other transactions of said partnership; and that said books of account, together with all bonds, notes, bills, assurances, letters, and other writings belonging to said partnership, shall be kept at the counting-house in Mobile, and each of the partners shall have free access at all times to examine and copy out of the same. On the 30th September, 1857, and on the 30th September in each succeeding year during the existence of the partnership, the books shall be balanced, a balance-sheet be made out in duplicate, and shall be signed by each of the partners within one month; and each of the partners shall take one of the balance-sheets into his custody, and shall be bound and concluded by every such balance-sheet respectively, unless some manifest error shall be discovered therein within twelve calendar months next ensuing, and be signified by either of the partners to the other; and then, and in such case, such error shall be rectified.

“In witness whereof, we have hereunto set our hands and seals to two copies, both of this tenor, this 12th day of May, 1856.”

The partnership commenced business on the 1st Sep-

tember, 1856, and continued without interruption until January, 1859; when Dumont returned from Europe, and, on the 3d February, 1859, excluded Ruepprecht from the counting-room, and refused all further intercourse with him. The complainant sought by his bill a dissolution of the partnership, on the ground that the defendant had neglected and mismanaged the partnership business, and had been guilty of several distinct violations of the articles of partnership; the principal charges of misconduct being, that he had drawn out from the moneys of the firm, for his own private use, a larger amount than he was entitled to receive, and that he loaned \$3,000 of the moneys belonging to the firm to Magee & Cluis, which was lost by their failure. The defendant filed an answer, denying all the charges of misconduct alleged against him, except in reference to the loan to Magee & Cluis; and as to that matter he alleged, that Magee & Cluis were personal friends of the complainant and himself, and were in good credit when the loan was made, and that the debt, instead of being lost, was well secured.

At the July term, 1859, the cause was brought to a hearing before Chancellor KEYES, who held, that the state of feeling between the parties was such that the partnership business could no longer be successfully prosecuted. He therefore decreed a dissolution of the partnership, to take effect as of the 3d February, 1859, and ordered an account to be taken by the master. At the ensuing March term, 1860, the master reported, that the business of the partnership during the first year resulted in a profit of \$25,864 03, during the second year in a loss of \$17,518 02, and during the third year, up to the time when the complainant excluded the defendant from the counting-house, in a loss of \$1,992 29; that the defendant was not personally responsible for any loss sustained by the firm, and had not drawn at any time more than was due to him; and that there was a balance due to the defendant, which, with interest up to the day on which the report was made, amounted to \$2,859 39. The complainant filed several ex-

ceptions, to the master's report, all of which were overruled by the chancellor (Hon. M. J. SAFFOLD), who confirmed the report, and rendered a decree in favor of the defendant, for the balance ascertained to be due to him. From this decree the complainant appeals, and assigns the same as error, together with the instructions to the master in taking the account, and the overruling of the exceptions to the master's report; and there was a cross appeal by the defendant.

F. S. BLOUNT, for appellant.

P. HAMILTON, *contra*.

R. W. WALKER, J.—Much of the controversy in this case turns upon the construction to be given to the articles of partnership; and the most material questions presented by the record will be disposed of, when the respective rights and duties of the parties under the articles are ascertained.

By their agreement, these parties formed a partnership, one-fourth of the net profits of which was to belong to Ruepprecht; and it was stipulated, that if Ruepprecht's share of the net profits should not amount to \$3,000 *at the close of each year*, Dumont was to *pay* him such sum as might be required to make up the amount of \$3,000. It is too clear for dispute, that by this contract Dumont guarantied that Ruepprecht should receive in any event \$3,000. This was the *minimum* sum. If one-fourth of the net profits exceeded that sum, he was entitled to the excess; but, if his stipulated share of the profits for any year did not reach that amount, or if no profits were realized, Dumont was, in either case, personally bound to pay him that sum. It appears that no profits were realized during the second year; and according to the agreement Dumont became personally liable to pay Ruepprecht \$3,000. Unless, therefore, there was something in the conduct of the latter which deprived him of that right, the fact that he credited himself with the sum of \$3,000 on the books of the firm, for the second year, forms no ground of complaint.

It is shown that Ruepprecht's share of the profits of the first year was \$6,466 01 ; that during that year he drew out \$3,376 28 ; that during the second year he drew out \$2,994 10, and that during the portion of the third year that he continued in charge of the business, he drew out \$1,724 63. The right of Ruepprecht to draw out more than \$200 per month, and the question whether his share of the profits of the first year, beyond \$200 per month, was, as between the parties, liable to the payment of the losses of the second year, may be considered together.

The stipulation that, if Ruepprecht's share of the profits did not amount to \$3,000 *at the close of each year*, Dumont was to *pay* him such sum as might be required to make up that amount, and the clause which provides that the books shall be annually balanced, and a balance-sheet made out and signed by each partner, show two things—*first*, that, as between the parties, Ruepprecht was to bear no part of the losses of any year, except so far as they might reduce his share of the profits of that year to \$3,000 ; and, *second*, that each year's business was to stand by itself, and be closed by itself. Each partner had, by the articles, the privilege of investing in the stock of the concern a capital not exceeding \$10,000,—the sum so invested to bear interest to the credit of the partner putting it in ; and neither partner was to be at liberty to withdraw any part of the capital thus invested, without giving his co-partner notice, and obtaining his consent to the withdrawal. The articles do not, as it seems to us, require the partners to let their respective shares of the profits of any one year remain in its business for the succeeding year. On the contrary, we think that, at the close of each year, each partner became entitled to his share of the profits of that year, as his private property, to be disposed of as he might please. He was not bound to invest it as so much capital in the stock of the concern. If he did so invest it, he was entitled to interest upon it. But the mere fact that Ruepprecht suffered a portion of his share of the profits of the first year

to remain to his credit on the books of the firm, without drawing interest, was not an investment of that amount in the capital stock of the concern, but a mere deposit of so much money, to be subject to his order, and to be drawn out when he might choose. The firm was his debtor to that amount, and, as between the partners, this sum was not liable for the losses of the succeeding year.

The articles provided, that each partner should be at liberty, from time to time, "to draw out of the moneys of the partnership" any sum, not exceeding \$200, for his own private use every month. This clause cannot be construed as prohibiting the partners from drawing out the respective shares of profits which, at the close of each year, might stand to their credit on the books of the firm. The balances, thus ascertained, were not "the moneys of the partnership," but the private property of the partners respectively. The prohibition has reference solely to the funds of the firm in hand before the result of the current year's business is settled, and it cannot be applied to the balances of profits which, on the annual settlements provided for, might be found due to each partner. These ascertained balances became private property; and if they were simply left with the firm, but not invested as capital, they are to be held as money loaned the firm by the partner, and not as 'money of the partnership.'

It appears that Ruepprecht did not draw out more than \$200 per month till the result of the first year's business was known. After that he drew more; but he did not draw out during that year as much as his share of the profits. Independent of this, we think it is too late for Mr. Dumont to complain that Mr. Ruepprecht drew out more than \$200 per month during the first year. The balance-sheet of that year's business was made out on the 30th September, 1857, and forwarded to Mr. Dumont. That balance-sheet showed that the share of profits to which Ruepprecht was entitled was \$6,466, and that the amount which stood to his credit on the books of the firm at the close of the year was \$3,089.73. From this it was ap-

parent that Ruepprecht must have drawn out \$3,376 28 during that year. Though thus notified that Ruepprecht had drawn out more than \$200 per month during the first year, Dumont made no complaint on that account for more than twelve months; and we think it is now too late to insist upon it.

The sums drawn out by Ruepprecht during the second year amount, in the aggregate, to \$2,994 10; whereas the balance of profits due him on account of the first year's business was \$3,089 73. This balance, we have seen, he had a right to draw, when, and in what sum he chose. The firm made no profits during the second year; and according to the articles Dumont was bound to pay Ruepprecht at the end of that year \$3,000. This amount, added to the unexpended balance of the first year's profits, (\$95 63,) left to his credit at the beginning of the third year \$3,095 63. During the third year, Ruepprecht drew out but \$1,724 66; so that he was not, at any time during the second or third year, equal in his drafts to the amount due him at the close of the preceding year.

2. What we have said disposes of the controversy between the parties, so far as it relates to the construction to be given to the articles of partnership. All the other questions presented by the record arise out of certain charges of misconduct and violation of duty, made by the complainant against the defendant. The first specification we shall consider separately, and pass it by for the present. We do not deem it necessary to go into a detailed discussion of the other charges, but content ourselves with saying in reference to them, that, after a careful examination of the evidence, we think that no case of misconduct, or gross neglect, by the defendant, resulting in injury to the firm, has been made out.

The first specification relates to a loan of \$3,000 of the money of the firm by Ruepprecht to Magee & Cluis. In thus lending the money of the firm, Ruepprecht was guilty of a breach of the articles of partnership. When a dissolution is decreed for such a cause, the court may declare

at what date the contract of partnership shall be at an end. *Durben v. Barber*, 14 Ohio, 315; *Johnston v. Fogg & Vanderslice*, 27 Ala. 432. It is now insisted, that the dissolution in this case should be made to date back to the 12th March, 1857, the time at which the loan was made to Magee & Cluis. But it appears that, although Magee & Cluis failed, their note has been settled by other parties, in pursuance of an arrangement for that purpose made by Ruepprecht, so that, in point of fact, no loss has been sustained by the firm of J. E. Dumont & Co. It may be questioned, whether a mere violation of the articles, without injury, would make it proper for the court to fix the date of the dissolution at a time earlier than the abandonment of the partnership by the aggrieved party. Indeed, none of the cases which assert the principle, that the court may declare at what date the contract shall be at an end, seem to have fixed the date of the dissolution at a time prior to such abandonment, and notice thereof to the offending partner.

In the present case, we do not perceive that the action of the chancellor, in regard to the date of the dissolution, affords the appellant any just cause of complaint. All the profits that were made by the firm, were made during the first year; and this loan of the firm money was not made until near the close of the business season, when most of the profits had been realized. Of his share of the profits which accrued prior to the date of the loan, Ruepprecht would not be deprived by a decree fixing that as the time of the dissolution. The only effect of such a modification of the decree would be to deprive the defendant of the annual allowance of \$3,000, to which, under the articles, he was entitled after the first year. But it is shown that Ruepprecht conducted the business of the concern, devoting his whole time thereto, from the date of the loan, until he was excluded from any further interference with the affairs of the firm by the complainant, in January, 1859. For the services rendered by him during this period, a court of equity, supposing that the dissolution should relate back to March, 1857, would not refuse him just com-

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pensation; and, on the facts disclosed, we cannot say that \$3,000 *per annum* would be too large an allowance for such services. For these reasons, we are not disposed to disturb this feature of the decree.

On the whole, our opinion is, that the appellant (Dumont) has failed to show any reversible error, and the decree must be affirmed.

On the suggestion of the counsel for Ruepprecht, the appeal taken by him is dismissed, at his costs.

DAVIS *vs.* HUBBARD.

[BILL IN EQUITY FOR INJUNCTION OF ACTION AT LAW, CANCELLATION OF BILL OF SALE, AND ACCOUNT.]

1. *Absolute bill of sale and defeasance together construed as mortgage.*—

A bill of sale for a slave, which is absolute on its face, and which recites the payment of a consideration much less than the real value of the slave; and a defeasance executed by the purchaser on the same day, by which he agrees to reconvey the slave at the end of the year, provided she should then be alive, and provided the vendor should pay him the amount of a debt then existing, and any other debt which he might contract during the year,—construed together, constitute a mortgage.

2. *When mortgagor may come into equity.*—The mortgagor of a slave, who is in possession, and who alleges that the debt has been paid, may nevertheless come into equity to enjoin an action at law for the slave, when it appears that there has been no acceptance of the payment as a satisfaction, and no release of the title by the mortgagee.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Nancy Davis, against John B. Hubbard, for the purpose of enjoining an action at law, instituted by said Hubbard against the complainant, for the recovery of a slave; and it also asked the cancella-

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tion of a bill of sale for the slave, which the complainant had executed to Hubbard, an account, and general relief. The bill alleged, that the bill of sale, though absolute on its face, was intended only as a mortgage, to secure the payment of a small debt which the complainant then owed to the defendant, and of any future debt which she might contract with him during the year, and was accompanied with a defeasance written on a separate piece of paper; that no money whatever was paid; and that the debts intended to be secured have been paid. The bill of sale was in the usual form, and dated the 13th December, 1854; recited the payment of two hundred and fifty dollars as the consideration, and contained a warranty of title and soundness. The defeasance, which was also dated the 13th December, 1854, was in the following words:

“I hereby acknowledge, that I have this day received from Mrs. Nancy Davis a bill of sale of a certain negro girl named Anna Sylvia, about four years of age, of yellow complexion; which girl I hereby oblige myself to reconvey to the said Nancy Davis at the end of one year from this date, provided the said girl should then be living, and provided also that the said Nancy Davis shall well and truly pay, or cause to be paid to me, all that she now owes to me, and all that may be due to me from her, arising from any future contracts or business, between now and the expiration of the one year above mentioned. Given under my hand,” &c.

The defendant filed an answer, in which he denied that the transaction was intended or understood as a mortgage; alleged, on the contrary, that it was an absolute sale, and that he paid the full value for the slave, by paying a debt which the complainant then owed to Melton, Brassell & Co., and by receipting in full the account which he then held against her; admitted the execution of the defeasance on the same day, but denied that the complainant had complied with the conditions therein prescribed; and demurred to the bill, for want of equity, and because the complainant had an adequate remedy at law. The chancellor sus-

tained the demurrer, and dismissed the bill; and his decree is now assigned as error.

L. E. PARSONS, and JOHN WHITE, for the appellant.

J. Q. LOOMIS, and W. L. YANCEY, *contra*.

A. J. WALKER, C. J.—The bill of sale by the complainant to the defendant, and the defeasance executed by the defendant on the same day, must be construed as one instrument. Together they make a mortgage. Every element of a mortgage is present in the transaction. It provides a security for present and prospective indebtedness; the life of the mortgaged slave remains at the risk of the debtor, and the bill shows that the property greatly exceeded the debts secured.—*Crews v. Threadgill*, 35 Ala. 334; *Pearson v. Seay*, 35 Ala. 612, and authorities therein cited.

[2.] The chancellor, while holding the instrument to be a mortgage, denied the equity of the bill, upon the ground that he was constrained by the decisions of this court to decide, that the mortgagor of a chattel in possession, who has paid the mortgage debt after default made, may defend at law, and has no right to come into chancery.

It must be admitted, that the decisions of this court give plausibility to the position of the chancellor. In one case it is held, that a mortgagor, who offered to discharge the debt within the time to which the period of redemption was by verbal agreement extended, might maintain detinue against the mortgagee.—*Deshazo v. Lewis*, 5 St. & Por. 91. So, it has been held, that the discharge or release of a mortgage, by a subsequent parol agreement, is available at law.—*Acker v. Bender*, 33 Ala. 230; *Wallis v. Long*, 16 Ala. 738. In the case of *Harrison v. Hicks*, (1 Por. 423,) a mortgagor brought a suit for the conversion of the mortgaged chattel; and the court charged the jury, that if a certain power of attorney, giving to the assignee of the mortgage authority to draw a sum of money belonging to the mortgagor, was accepted by such assignee “as a release

of his title" to the mortgagor, the title would be revested in the mortgagor. This court, in affirming the correctness of that charge, said: "In the case of a mortgaged chattel, where the debt has been paid, the legal title is perfect in the mortgagor. If this principle be correct, a resort to chancery would not be tolerated, even if the mortgagee were in possession of the property. But when the debt has been paid, and the chattel in possession, there can be no doubt of a perfect legal title, the bill of sale notwithstanding."

While the question of this case is covered by the language used in the decision from which the above quotation is made, it must be observed, that the question was different. There the question was as to the effect of a satisfaction, accepted as a release of the mortgage; while here the question is as to the effect upon the jurisdiction of a chancery court of a payment not received or recognized as a discharge of the mortgage, or of the mortgage debt. Whether this difference makes a distinction in principle, we shall not inquire. At all events, it is clear that the court was only called upon to decide as to the remedy at law, and not to pass upon the question of a concurrence of remedy in chancery.

In *Brown v. Lipsecomb*, (9 Porter, 472,) it was decided, that the legal title of a mortgagee to a slave becomes absolute by a forfeiture of the condition, and is not divested by a subsequent payment. In *Sims v. Canfield*, (2 Ala. 555,) the court, considering the remedy of a mortgagor, who had after default tendered the money due, said: "But, if it was admitted, that the mortgagor may, under such circumstances, have his action of trover or detinue against the mortgagee, it will not follow that chancery is ousted of the jurisdiction of a bill to redeem the mortgaged chattel. Even a pledgor may go into equity, whenever it becomes necessary to have an account. Whenever slaves are the subject of a mortgage, it most frequently happens that it is necessary to take an account, as the mortgagee is in possession, and consequently in receipt of their profits.

This is here shown to be the case by the allegations of the bill; and therefore we consider that in this case the court of chancery had jurisdiction”.

It is certain that courts of chancery originally had jurisdiction to decree the redemption of mortgaged chattels, as well as real estate. Indeed, the right to redeem after default made is a doctrine which originated with the chancery court, and is recognized as an equitable doctrine in the text-books.—2.Story's Equity, §§ 1014, 1015, 1030. As the redemption of mortgaged chattels originally belonged to the jurisdiction of the chancery court, it is not divested of that jurisdiction, even though it may now be exercised by courts of law. Guided by principle, we are bound to decide that, in such a case as this, where there has been no acceptance of the payment as a satisfaction, and no release of the title to the mortgagor, there is a jurisdiction in the chancery court. Upon the facts of this case, there is no consent on the part of the mortgagee to the return of the title to the mortgagor; and we think that, on the score of expediency, she ought not to be compelled to rely upon a mere implication of title from the payment.

If it be conceded that there was a concurrence of remedy, then the court which first obtained jurisdiction would retain it in exclusion of the other. That principle, however, would have no application here. If it be admitted that the complainant might have defended the action at law, brought by the defendant for the recovery of the slave; yet the bringing of that suit did not put in exercise the jurisdiction of the court over the defensive matter. If the complainant had permitted the suit at law to proceed to a judgment, without interposing her defense, and thus suffered her right to defend to become *res adjudicata*, the question would have been different.—*Pearce v. Winter Iron Works*, 32 Ala. 68; *Foster v. State Bank*, 17 Ala. 672. If the chancellor should be of the opinion that the bill was unnecessarily filed, he might, perhaps, in the exercise of his discretion, refuse a preliminary injunction, and refuse costs; but he could not refuse to exercise

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his jurisdiction to grant the appropriate relief.—*Sailly v. Elmore*, 2 Paige, 499.

Reversed and remanded.

COLTART vs. LAUGHINGHOUSE.

[DETINUE FOR SLAVES.]

1. *Competency of witness, as affected by interest.*—Where an execution against a partnership is levied on a slave, and a purchaser from one of the partners brings detinue to recover the slave, the other partner is a competent witness for the defendant, (Code, § 2302,) since a judgment against him would not be competent evidence against the witness in a subsequent suit.
2. *Assignment of error not supported by exceptions.*—Where the exclusion of a witness is assigned as error, while the bill of exceptions shows that only a portion of the witness' testimony was excluded, the assignment of error does not cover the ruling of the court.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. S. D. HALE.

THIS action was brought by George W. Laughinghouse and Fleming Jordan, against Robert W. Coltart, to recover several slaves, together with damages for their detention. The bill of exceptions is as follows: "On the trial of this cause, the defendant introduced judgments rendered in said court, and executions issued thereon; one of said judgments being in favor of Wiley, Banks & Co., against John W. Weaver, William Derrick, and Robert Freeman; another, in favor of Gardner, Shepherd & Co., against John W. Weaver and Samuel M. Weaver, as partners under the style of John W. Weaver & Co.; and another in favor of L. B. Fite & Co., against the same; and executions issued upon said judgments, and levied on the slaves in controversy. Defendant then introduced Samuel M. Weaver as a witness; to whose competency the plaintiffs objected.

Said witness stated, on his *voir dire*, that he was not a partner of John W. Weaver, although the judgments and executions above named introduced him as one of the partners; that articles of partnership had been drawn up between him and John W. Weaver, and said partnership business was carried on in the partnership name; but said contract had never been complied with, and therefore he did not consider himself a partner. The court sustained the objection, and excluded the witness; to which the defendant excepted. It was in evidence, also, that plaintiffs claimed the slaves by purchase from John W. Weaver. Defendant also introduced executions, issued from said court, in favor of Morgan & Co. and Duncan, Morgan & Co., against said John W. Weaver & Co., which had been levied on the slaves in controversy only a few days before the executions above named; and [offered?] to prove by Gen. L. P. Walker, that [said] executions were satisfied by plaintiffs; to which testimony of Gen. Walker plaintiffs objected, and the court sustained their objection; to which the defendant excepted. It was also shown by plaintiffs' testimony, that said Fleming Jordan had paid, as the administrator of one McCartney's estate, a sum of money for which McCartney was bound as endorser for said John W. Weaver, as part of the purchase-money for said negroes, there being no testimony to show that there was any special understanding and agreement between said Jordan and Weaver to that effect; and the defendant asked the court to charge the jury, that a payment made by Jordan as administrator, as stated, could not be claimed by him as purchase-money paid to Weaver for his individual benefit. All of which is signed," &c.

It is now assigned as error—1st, that the court below erred in excluding Samuel M. Weaver as a witness; 2d, "in excluding L. P. Walker as a witness, as shown in the bill of exceptions;" and, 3d, "in refusing the charge asked by defendant, as shown in the bill of exceptions."

S. D. J. MOORE, for appellant.

ROBINSON & JONES, *contra*.

R. W. WALKER, J.—We are not able to perceive any ground on which to hold that the witness Weaver was incompetent to testify for the defendant. Under the Code, (§ 2302,) the competency of a witness depends upon the question, whether the verdict and judgment would be evidence for him in another suit; and the test whether they would be evidence for him, is the inquiry, would they be evidence against him if adverse to the party introducing him? In other words, the witness is competent, unless the verdict and judgment would be evidence for or against him in another suit, according as they may be for or against the party calling him. As a judgment in this case against the defendant would, as to the witness Weaver, be *res inter alios acta*, and, therefore, could not in any subsequent suit be evidence against him, he was not incompetent.—*Harris v. Plant*, 31 Ala. 644; *Blakey v. Blakey*, 33 Ala. 618; *Nesbitt v. Pearson*, 33 Ala. 673; *Atwood v. Wright*, 29 Ala. 346; *Moore v. Lea*, 32 Ala. 375; *Rupert v. Elston*, 35 Ala. 86; *Crutchfield v. Hudson*, 23 Ala. 393.

[2.] The second assignment of error is, that the court erred in excluding Gen'l L. P. Walker as a witness. The record does not show that this witness was excluded, but simply that a part of his testimony was rejected; and this ruling of the court is not covered by the assignment of error.

The third assignment of error is unsupported by any exception in the court below. The defendant asked a charge; but the bill of exceptions does not show that it was refused, or that any exception was taken by the defendant.

Judgment reversed, and cause remanded.

DUBBERLY vs. BLACK'S ADM'R.

[SUMMARY PROCEEDING BY SURETY AGAINST PRINCIPAL.]

1. *Averment and proof of issue of injunction.*—An averment, that the principal obligor in an injunction bond “obtained an injunction” from a circuit judge, involves the assertion that a writ of injunction was issued; but a recital in the bond, that he had “obtained an order for an injunction,” does not show that the writ was issued.
2. *Statutory judgment on injunction bond.*—On the dismissal of a bill in chancery, and the consequent dissolution of the injunction, under the law which was of force in 1845, a statutory judgment resulted against the obligors on the injunction bond, notwithstanding the failure of the register to certify the dissolution of the injunction to the clerk of the court in which the judgment at law was rendered.
3. *Summary proceeding by surety against principal; when maintainable, and where instituted.*—A surety on an injunction bond, having paid the judgment against his principal and himself, which resulted by operation of law from the dissolution of the injunction, may maintain a summary proceeding against his principal, under section 2644 of the Code; and, under section 2650, the motion may be made in the county of the defendant's residence.
4. *Sufficiency of notice, in averring plaintiff's appointment and right to sue as administrator.*—Held, that the notice in this case showed with sufficient certainty the plaintiff's appointment as administrator, and that the cause of action appertained to him in his representative capacity.
5. *Payment of execution to sheriff after expiration of term of office.*—A sheriff has no authority, after he has gone out of office, to receive payment of an execution which he has returned; yet, if he receives the money, and pays it over to the plaintiff's attorney, by whom it is accepted as a payment, the payment is good, and the execution thereby discharged.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was commenced by a notice, which, as amended, was in the following words:

“To Allen Dubberly:—You are hereby notified, that whereas David Cannon heretofore, to-wit, at the October term of the circuit court of Montgomery county, on (to-wit) the 31st October, 1842, at (to-wit) in said county of Montgomery, recovered a judgment against you, the

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said Allen Dubberly, for the sum of \$343 50, and costs of suit in that behalf; *and whereas*, also, on the 16th May, 1845, you, the said Allen Dubberly, did file your certain bill in the chancery court of Montgomery, and did apply for, and obtain from Hon. George W. Stone, one of the circuit judges of the courts of common law for the State of Alabama, an injunction, restraining the said David Cannon from proceeding further to collect said judgment, and from proceeding in a certain action of ejectment then pending in the circuit court of Montgomery county, in favor of said David Cannon; and against you, the said Allen Dubberly; *and whereas*, also, you did, on the said 16th May, 1845, on your application for said injunction, execute your certain injunction bond, with Thomas Bradley, Andrew Dickey, and Ryal Black, as sureties on the same, in substance as follows", &c., setting out a copy of the bond; "*and whereas*, also, at the July term, 1845, of the chancery court of Montgomery county, there was made the following order and decree", &c., setting out the decree dismissing the bill with costs; "*and whereas*, also, there issued from W. L. Coleman, the register of said chancery court of Montgomery county, to the clerk of the circuit court of said county, a certificate in substance as follows," setting it out; "*and whereas*, by reason of said injunction bond, and the dismissal of said bill in chancery filed by you against the said David Cannon, the said Thomas Bradley, Andrew Dickey, and Ryal Black, the sureties on said injunction bond, became liable by operation of law, as your sureties on said bond, to the said David Cannon, to pay him the said sum of money mentioned in said judgment at law, so recovered against you as aforesaid, on (to-wit) the 31st October, 1842, in the circuit court of Montgomery county, for the sum of \$343 50, and interest thereon, with the costs of suit; *and whereas*, also, the said Ryal Black, on (to-wit) the 1st July, 1852, did pay to the said David Cannon the sum of \$255, in part payment of said judgment so recovered against you as aforesaid; *and whereas*, afterwards, to-wit, on the 15th October, 1852, the

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said Ryal Black did pay the said David Cannon the further sum of \$376 93, the balance of said judgment and costs recovered against you as aforesaid by the said David Cannon : Now, therefore, you are hereby notified, that I, James W. Black, administrator *de bonis non* of the goods, chattels and credits which were of the said Ryal Black, deceased, at the time of his death, will move the circuit court of Macon county, on the first Saturday of said court, to be held for said county on the 9th April, 1856, for a judgment against you, for the several sums of money paid by the said Ryal Black, deceased, as aforesaid, to the said David Cannon, for you, and as your surety on said injunction bond, with interest thereon from the respective dates of said several payments before mentioned, and also for the costs of this motion."

The condition of the injunction bond, as copied into the notice, was as follows : "The condition of the above obligation is such, that whereas the above-bound Allen Dubberly has, the day and date above written, prayed for and obtained an order for an injunction, restraining the said David Cannon from proceeding further to collect a certain judgment described in said bill, and from proceeding in a certain action of ejectment, now pending in the circuit court of Montgomery county, in favor of said David Cannon, and against the said Allen Dubberly ; now, if the said Allen Dubberly, in the event the said injunction is dissolved, shall pay said judgment, and all damages and costs of suit, which may be adjudged complainant (?) for the wrongful obtaining his injunction, then this obligation to be void," &c. The chancellor's decree in the injunction suit was in these words : "In this case, it is ordered and decreed, that the bill be dismissed, with costs." The register's certificate to the clerk of the circuit court simply stated, "that the foregoing is a copy of the injunction bond in said case, and a copy of the order and decree rendered at the July term, 1845, of said court."

The defendant demurred to the notice, and assigned the following (with other) causes of demurrer : "because there

is no sufficient averment that an injunction did issue"; "because it does not show that there was any judgment against plaintiff's intestate"; "because there was no such averment of payment as will sustain this proceeding"; "because this court has no jurisdiction of said proceeding"; "because the plaintiff's demand, if any he has, has become stale, and is barred by the statute of limitations"; and "because there is no sufficient averment of the plaintiff's right to maintain the proceeding." The court overruled the demurrer, and the defendant excepted; and issue was then joined on the pleas of "the general issue and payment."

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence a certified copy of the record and proceedings of the circuit court in the case of David Cannon against Allen Dubberly, in which was included a copy of the chancellor's decree in the injunction suit, and of the register's certificate on the dismissal of the bill, as above set out. The defendant objected to these portions of the record, on the ground that they were mere secondary evidence, and reserved an exception to the overruling of his objections. To prove the payment of the judgment by his intestate, the plaintiff introduced one Rutherford as a witness, who was the sheriff of Macon county in 1848-49, and who testified, that after he had ceased to be sheriff, and had returned an execution issued on said judgment against Dubberly and his sureties on the injunction bond, Ryal Black paid him the money due on the execution, and that he paid it over, for said Black, to the attorney of the plaintiff in execution; and said attorney testified, that he accepted the money, as attorney for Cannon, in satisfaction of the execution. The defendant objected to this evidence, on the ground that it was incompetent and insufficient to prove payment; but the court overruled his objections, and he excepted.

The defendant requested the court to charge the jury, that the payment to Rutherford, when he was not the sheriff, and had no execution in his hands, "did not sup-

port the allegation of payment as set forth in the plaintiff's notice"; which charge the court gave, but with the qualification, "that if the money was received by Cannon's attorney as payment of the execution, the evidence of payment was sufficient"; and to this qualification of the charge the defendant reserved an exception.

The defendant also asked the court to charge the jury, among other things, "that the plaintiff, before he can recover, must show to their satisfaction that a writ of injunction did issue, restraining the enforcement of the judgment"; which charge the court also gave, but with the qualification, "that the recitals of the injunction bond, as copied in the transcript which was read in evidence, are evidence that a writ of injunction did issue"; and to this qualification of the charge the defendant excepted.

The overruling of the demurrer to the notice, the rulings of the court on the evidence, and the refusal of the several charges asked by the defendant, are now assigned as error.

GEO. W. GUNN, for appellant.

MARTIN, BALDWIN & SAYRE, *contra*.

A. J. WALKER, C. J.—In this case, a surety on an injunction bond, executed in 1845, proceeds by notice against his principal, to obtain a judgment for money paid by him as such surety. It is objected to the notice, that it fails to show that an injunction ever issued. The amended complaint expressly avers, that the plaintiff's principal obtained from a circuit judge an injunction. We think this averment involves the assertion that an injunction issued.—*Ex parte Greene v. Graham*, 29 Ala. 52; Const. of Ala., article 5, § 8. The same subject was presented in a charge requested. The court charged the jury, upon the defendant's motion, that the plaintiff could not recover, unless it was shown that an injunction actually issued. This charge was certainly correct, for there can be no liability upon an injunction bond, unless the injunction issues.—*Shorter v. Mims*, 18 Ala. 655. And if the surety paid the judgment, when

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there had been no process enjoining it, he did it in his own wrong.

But, while the court gave the correct charge above stated, it added, that the recitals in the injunction bond were evidence of the issue of the injunction. In this we think the court erred. The bond does not recite that an injunction had issued, but simply that the complainant in the chancery suit had obtained an order for an injunction. The obtaining an order for an injunction from a proper authority, and the obtaining an injunction, are very different things. The rule of practice which was in force at that time, (Clay's Digest, 615, § 27,) required, that the bond should be given in such sum, and with such condition, as the chancellor or judge might direct, before the injunction issued. Under this rule, the practice which was adopted, and which was obviously necessary, was for the judge or chancellor to order an injunction to issue, upon the execution of a bond, with prescribed condition and penalty, and the injunction was issued after the giving of the bond. If the injunction had issued before the bond was given, the rule would have been violated. It is obvious that the recital of the bond in this case shows nothing more than that it was given, in conformity to the rule of practice, after the *fiat*, or order for the injunction.

[2-3.] The objection taken by demurrer, that this proceeding could not be instituted in Mason county, is untenable. Section 2650 of the Code authorizes the making of the motion in the county of the defendant's residence. If an injunction issued in 1845, and the bill was afterwards dismissed in the same year, (the injunction being thereby dissolved,) a statutory judgment against the obligors in the injunction bond resulted, notwithstanding the register may have failed to issue to the clerk of the circuit court a certificate of dissolution of the injunction, as required by the act of 1841.—*Wiswall v. Munroe*, 4 Ala. 9. This statutory judgment, thus resulting, would be a judgment rendered against a surety, within section 2644 of the Code; and the surety, having satisfied the judgment, would have a right to proceed by notice, as is done in this case.

[4.] We think the cause of action is sufficiently shown by the notice to have appertained to the plaintiff in his capacity of administrator.—*Watson v. Collins' Adm'r*, 37 Ala. We think, also, that the notice sufficiently avers that the plaintiff was the administrator of the estate.

[5.] After Rutherford, the witness, had ceased to be sheriff, and had returned the execution, his authority, *virtute officii*, to receive payment of the execution, was gone. But the money paid to Rutherford was handed over to the plaintiff's attorney as a payment, and seems to have been so accepted. This fact makes the payment good; and, notwithstanding Rutherford's want of authority, would discharge the execution.

Care in the procurement of the proper evidence will avoid the other questions presented by the rulings upon the admissibility of testimony, and we therefore do not notice them in this opinion.

Reversed and remanded.

HUMPHRIES vs. DAWSON.

[DETINUE FOR SLAVES.]

1. *Amendment of complaint.*—Where the plaintiff sues as “trustee of L. H. and F. D.,” two married women, the complaint may be amended, (Code, § 2403,) by adding the words “and for the remainder-men who are their children.”
2. *Plea in abatement of pendency of another action.*—The priority, and not the mere pendency, of another suit founded on the same cause of action, is available under a plea in abatement; but neither a bill in chancery, nor an action brought in another State, is good matter in abatement.
3. *Competency of donor, as witness for donee.*—The donor of a slave is a competent witness for the donee, or one claiming under the donee, in a suit involving the title to the slave.
4. *Identification of exhibit to deposition.*—Where the commissioner certifies, “that the annexed deed, hereto attached, marked ‘A,’ was shown to the witness, and by him examined and recognized to be the original deed by him signed and delivered,” a deed which is shown to have

been enclosed in the package containing the deposition, and which is marked as stated in the certificate, is sufficiently identified as the exhibit referred to.

5. *Construction of deed, as to respective rights of trustee and beneficiaries.*

Where a female slave is conveyed by deed to a trustee, "in trust that he shall take and receive all the profits and income arising from the said slave and her increase, and apply the same to the education and maintenance of L. and H.," his two daughters, "and in trust, upon the marriage or coming of age of the said L. and H., to permit them to have the full use, authority and command over the said slave and her increase; (a division or partition having been made,) for and during the natural lives of the said L. and H.; and after their death, in trust further to convey the respective portions of the property to their children, in fee-simple forever,"—if the slaves are divided between the two daughters, on their marriage or coming of age, and the respective portion of each delivered to her by the trustee, he cannot afterwards, during the lives of the daughters, maintain detinue against them, or any one holding under them, to recover the slaves; and if, without making a division, he delivers all the slaves to one of the daughters, on her marriage, and afterwards conveys other property to the other daughter in lieu of her interest in the slaves, he cannot maintain detinue for the slaves, against a purchaser from the daughter to whom they were delivered.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Samuel Dawson, against John R. Humphries, to recover a negro woman named Becky, with her four children, and damages for their detention. The original complaint is nowhere set out in the record; but the bill of exceptions states, "that the plaintiff moved to amend his complaint, by adding, after the words 'trustee of Leonora Hobbs and Frances Dillard,' the words 'and for the remainder-men which are their children;' to which amendment the defendant objected, as changing the character in which the plaintiff sued, and as putting a new title in issue; but the court overruled the objection, and allowed the amendment to be made, and the defendant excepted." The defendant then prepared and tendered a plea in abatement, duly verified by affidavit, alleging that, on the 24th May, 1858, before the complaint in this case was amended, a bill in equity was filed on the chancery side of the circuit court of Lowndes county, Mississippi,

in the name of Samuel Dawson, as trustee of Leonora Hobbs and Frances Dillard and their children, against the defendant in this suit and others, to recover the slaves here in controversy; which suit, the plea averred, was still pending and undecided, and involved the same title that was put in issue by the amended complaint. The court rejected the plea, on the ground that it came too late; to which the defendant reserved an exception.

The plaintiff claimed the slaves under a deed from John D. Dawson, which was executed in South Carolina, dated March 1, 1844, and in the following words: "Know all men by these presents, that for and in consideration of the natural love and affection I have and bear to Leonora and Frances, daughters of Samuel Dawson, and for and in consideration of the sum of one dollar to me in hand paid at and before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have bargained, sold, assigned, and set over to the said Samuel Dawson, all my right, title and interest in and to a negro girl, named Becky, and her increase; to have and to hold the said negro girl and her increase, unto the said Samuel Dawson, his heirs, and assigns, to his and their own proper use and behoof forever; in trust, nevertheless, that the said Samuel Dawson take and receive all the profits and income arising or to arise from the said slave and her increase, and apply the same to the education and maintenance of Leonora and Frances; and in trust, upon the marriage or coming of age of the said Leonora and Frances, to permit them to have the full use, authority and command over Becky and her increase, (a division or partition having been made,) for and during the natural lives of them, the said Leonora and Frances; and after their death, in trust further to convey the respective portions of the above-named property to the children of the said Leonora and Frances, in fee-simple forever. In witness whereof," &c.

For the purpose of proving the execution and delivery of this deed, the plaintiff took the deposition of said John D. Dawson. Before the trial began, the defendant moved

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to suppress the deposition of said Dawson, "on the ground that he was the donor of the property sued for, and because he cannot be received as a witness to prove the execution of said deed, unless the testimony of the subscribing witnesses thereto is shown to be inaccessible." The court overruled the objections, and the defendant excepted. The defendant also moved to suppress the original deed, which was made an exhibit to Dawson's deposition, "on the ground that it is not in any wise attached to said deposition, nor certified by the commissioner." The commissioner stated, in his certificate to the deposition, "that the annexed deed of conveyance, hereunto attached, marked 'A,' was shown to the witness, and by him examined and recognized to be the original deed by him signed and delivered." The deed, on inspection, was found to be endorsed "A," and was shown to have been enclosed in the package containing the deposition of the witness, and to have been attached to the interrogatories after the deposition had been opened. The court refused to suppress the deed, and the defendant excepted.

The evidence showed that, soon after the marriage of Leonora with A. H. Hobbs, which was in 1841, she and her husband removed to this State, and brought the slaves with them; and that, in 1845, they sold the slaves to one Lawrence, who afterwards sold and conveyed them to the defendant. The defendant also introduced evidence showing that Samuel Dawson delivered the slaves to said Hobbs and wife, soon after their marriage, and consented that they might bring the slaves with them to this State; and that the subsequent sale by Hobbs and wife to Lawrence was made with his approbation, and by his authority. There was other evidence in the case, also, but it requires no particular notice.

The court charged the jury, among other things, as follows: "3. That the deed from John D. Dawson to Samuel Dawson required that a partition or division of said slaves should be made, before the trust could be executed in favor of said Leonora, so as to vest the legal title to any

portion of said property ; and that, unless the proof showed that such division or partition had been made, Hobbs and wife had no legal interest which they could dispose of." The defendant reserved an exception to this charge, and requested, among other charges, the following: "5. If the jury believe, from the evidence, that on the marriage of Leonora with said Hobbs, plaintiff delivered the property to them under the trust created by the deed from John D. Dawson, for the purpose of letting them keep the entire property without division or partition; and that after the marriage of Frances with Dillard, plaintiff paid them in other property, or agreed to do so; and that they consented to such arrangement; and that plaintiff, in pursuance of such agreement, paid them a tract of land; and that they received the same in part payment of their interest in the slaves sued for in this action, for the purpose of letting Hobbs and wife keep the entire property in the slaves; and that all this took place before the slaves were sold by Hobbs and wife to Lawrence,—then the plaintiff cannot recover in this action, if the defendant has acquired the interest of said Hobbs and wife." The court refused this charge, and the defendant excepted to its refusal.

All the rulings of the court, to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

RICHARDS & FALKNER, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

R. W. WALKER, J.—[1.] The original complaint described the plaintiff as "trustee of Leonora Hobbs and Frances Dillard." Upon the trial, against the defendant's objection, the plaintiff was permitted to amend the complaint, by adding, "and for the remainder-men which are their children." In this we think there was no error. The original complaint averred that the plaintiff was suing, not as an individual, but in a representative capacity. The amendment is but a further and more accurate description

of his representative capacity, and did not substitute a new cause of action. If the complaint had been by the plaintiff individually, he could have amended it, so as to authorize a recovery in his representative capacity.—*Crimm's Adm'r v. Crawford*, 29 Ala. 626. In that case, it is said—"Such an amendment does not substitute a new cause of action. The cause of action is really the same. The amendment merely inserts that which is necessary to secure a recovery upon the existing cause of action, which was imperfectly set forth."

2. The matter of the plea in abatement, which was rejected by the court, would not have been available to the defendant; and hence its rejection could work no injury to him. It is the priority of a suit, that abates another founded on the same cause of action.—1 Chitty's Pl. 215; *Renner v. Marshall*, 1 Wheaton; 215. If there be any reason which renders this principle inapplicable in the present case, a fatal objection to the plea is found in the other principle, that the pendency of a suit in another State is no cause of abatement of a suit instituted in this State. *Browne v. Joy*, 9 Johns. 221; *Walshe v. Durkin*, 12 Johns. 99; *Salmon v. Wooten*, 9 Dana, 422; *McGilton v. Love*, 13 Ill. 486; *Drake v. Brender*, 8 Texas, 352; 2 Parsons on Contracts, 232; *Hatch v. Spofford*, 22 Conn. 496, *et seq.* It appears, also, that the pendency of a bill in equity has not usually been considered sufficient ground for a plea in abatement of a suit at law.—*Colt v. Partridge*, 7 Metcalf, 570 (576); *Blanchard v. Stone*, 16 Vermont, 234; *Hatch v. Spofford*, 22 Conn. 495-6; Story's Conflict of Laws, § 610 (a), Bennett's edition.

3. The motion to suppress the deposition of John D. Dawson was properly overruled. The donor is a competent witness for the donee, or one holding under the latter. *Jones v. Hoskins*, 18 Ala. 489.

4. There was no error in overruling the motion to suppress the original deed of gift.

The bill of exceptions does not show that any exception was taken to the ruling of the court in relation to the offer

of the defendant to read a portion of the former deposition of John D. Dawson.

5. It will not be denied, that if, on the marriage, or coming of age of the daughters, the property had been divided, and their respective portions delivered to them by the trustee, he could not afterwards, and during the lives of the daughters, have maintained detinue for the recovery of the slaves, against the daughters, or any one holding under them. For, whatever might be the case as to the continuance of the legal title in the trustee, it is obvious that, on the facts supposed, the trustee would not, during the lives of the daughters, have the legal right to the possession of the slaves. On the contrary, the right to the possession would, according to the stipulations of the deed, be in the daughters; and where the deed stipulates for the possession of the *cestui que trust*, the trustee, though he may be clothed with the legal title, cannot maintain detinue against the *cestui que trust*.—*Gunn v. Barrow*, 17 Ala. 247.

Now it is obvious that the deed contemplated a division of the property on the marriage or coming of age of the daughters. That is the period indicated as the time at which it was the duty of the trustee to make the division. It is obvious, moreover, that the direction that the division should be then made, was intended mainly for the benefit of the daughters; its purpose being, to secure to them, after their marriage, or coming of age, and during their lives, the separate use and enjoyment of equal shares of the property. The division then made would, it is true, have the secondary effect of ascertaining the respective portions of the property to which the rights of each set of remainder-men would attach. But it is not to be doubted, that the primary purpose of making the division at the particular time designated by the donor, was what is above stated. It appears, however, that the trustee failed to perform the duty cast upon him, to divide the property on the marriage or coming of age of the daughters. The evidence tended to show that, without making any such division, he delivered all the slaves to one of the daughters after her

marriage. The bill of exceptions discloses, moreover, that there was evidence tending to show that, after the marriage of the daughters, an arrangement was effected, to which the trustee was a party, and the validity of which he is therefore in no condition to question; whereby Mrs. Dillard received from the trustee other property, in lieu of her interest in the slaves, for the purpose of vesting in Mrs. Hobbs, who was then in possession, the entire interest of both daughters under the deed; and that in pursuance of this arrangement, Mrs. Hobbs and her husband remained in possession of the entire property until they sold to Lawrence.

On this state of facts; it is obvious that; so far as the interests of the daughters are concerned, the necessity for a division is obviated, by the arrangement whereby the two interests were merged, and vested in one of the daughters. It is also clear, that if the facts were as here supposed, the division of the property which, under the deed, it was the duty of the trustee to make, on the marriage or coming of age of the daughters, was no longer practicable when this suit was begun. The division intended by the donor was to be made, as we have seen, on the marriage or coming of age of the daughters. The property consisted of a female slave and her increase. From the nature of the property, constant changes must be going on in its value and amount; so that, at the time this suit was brought, it was manifestly impossible to make the very division which should have been made at the time appointed by the deed. In other words, it would not be practicable to so divide the property, in 1853, as to allot to each daughter the very share which would have fallen to her if the division had been made four or five years sooner. So far as the interests of the remainder-men are concerned, a division made now would be no more in conformity with the requirements of the deed than one which may be made at the termination of the life-estate. The trustee has suffered the time appointed for the division to pass by. The donor intended that the division should take place on the marriage or coming of age of the

daughters, before the delivery of the property to them, and when both daughters had an interest in the property, and each might be considered as representing her own children, the remainder-men after her, in the making of the division. By the act of the trustee, the making of the division at the time, and under the circumstances intended by the donor, has become impossible ; and so far as the interests of the remainder-men, or the purposes of the donor in regard to them, are concerned, there is no reason why the division may not be made at the termination of the life-estate, as well as at this time.

The ground on which the trustee's right to reduce the property to his possession is placed, is that the trust in reference to the division has not been executed. But, as we have seen, there was evidence tending to show that, by the agency of the trustee himself, a state of facts has been brought about which renders the execution of that trust, as contemplated by the deed, no longer practicable ; and our opinion is, that if the facts referred to were established by the evidence, it was not essential to the defense of this suit to show that there had been an actual division or partition of the property. We think that the court erred in the third charge given, and in refusing to give the fifth charge asked by the defendant.

We do not intend, by anything we have said, to express an opinion adverse to the continuance of the legal title in the trustee ; nor are we to be understood as indicating any opinion upon the question of the right or duty of the trustee to protect, by proceedings in another forum, the interests of the remainder-men,

Judgment reversed, and cause remanded.

GIMON vs. TERRELL.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Proof of agency.*—As a general rule, the fact of agency must be proved by other evidence than the acts of the agent himself, before it can be assumed that his acts are binding on the principal; yet, where there is any evidence of an assent on the part of the principal to the acts of the agent, or where the acts themselves are of such nature, or so continuous, as to furnish a reasonable ground of inference that they must have been known to the principal, and that he would not have permitted the agent thus to act without authority, the acts themselves are admissible evidence to prove the agency.
2. *Proof of contract of hiring; admissibility of agent's acts as evidence against principal.*—The question being, whether defendants employed plaintiff's slave on their boat without authority, or hired him from plaintiff's authorized agent; and there being some evidence tending to show the agency,—the fact that the agent “came down to the boat, and inquired about the slave,” is relevant evidence, as tending to show knowledge and assent on the part of the agent to the employment of the slave by the defendants, and thus tending to show a contract of hiring.
3. *Authority of agent.*—An agent, who is authorized to hire out and look after his principal's slaves, may, by hiring one of the slaves to a person who already has possession of him without authority, legalize the subsequent employment of the slave by the hirer.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Dominick Gimon, against W. M. Terrell and others, owners of the steamboat *Lucy Bell*, to recover damages for the conversion of a slave named Brister, who was accidentally drowned while employed as a deck hand on the defendants' boat. The rulings of the court on the trial, to which exceptions were reserved by the plaintiff, and which are now assigned as error, are thus stated in the bill of exceptions:—

“The defendants introduced a witness, by whom they offered to prove, that he (witness) saw one Peter Desplous, for one or two years before the drowning of Brister, at different times officiating in hiring and looking after the ne-

groes belonging to the plaintiff; that he saw Desplous talking to Brister on the wharf, while Brister was employed on the *Lucy Bell*, and gave him a piece of tobacco. The plaintiff objected to the examination of the witness for this purpose,—as well to the questions put to elicit this evidence, as to the evidence itself; but his objections were overruled, and he excepted.

“The defendants introduced another witness, and offered to prove by him, that said Peter Desplous, before Brister was drowned, came down to the *Lucy Bell*, and inquired of witness about Brister; that he replied, Brister was on the *Lucy Bell*; and that said Desplous then told him that plaintiff was sick, and had sent him to see about Brister. Plaintiff objected to the introduction of this evidence,—as well to the questions put to elicit it, as to the evidence itself; but the court overruled his objections, and he excepted. Plaintiff then introduced said Desplous as a witness, who testified, that he never acted as plaintiff’s agent in the hiring of his negroes; that one Simmons was his clerk and agent for this purpose at the time of Brister’s death; that he did not go to the *Lucy Bell* before the negro was drowned, but was requested by plaintiff, after the boy was drowned, to go down to the wharf, and ascertain where he was; that he did go, and, on inquiry of the second clerk of the *Lucy Bell*, was told that he was drowned, and that he reported this to the plaintiff.

“The plaintiff asked the court to charge the jury, that, although they might believe, from the evidence, that Desplous was the agent of the plaintiff in hiring and looking after his negroes, yet such agency would not authorize Desplous to ratify a previous conversion of Brister by the defendants, or to permit them to use the negro, so as to bind the plaintiff, if their original possession was unauthorized and illegal. The court refused to give this charge, and the plaintiff excepted to its refusal.”

L. S. LUDE, for appellant.

WM. BOYLES, and S. J. CUMMING, *contra*.

R. W. WALKER, J.—The plaintiff's objection to the evidence of the first witness for the defendant, was to the evidence as a whole. Consequently, if any portion of it was admissible, the objection was properly overruled. A part of this evidence was, that the witness "saw Peter Desplous, for one or two years before the drowning of Brister, at different times officiating in hiring and looking after the negroes belonging to the plaintiff". Whether Desplous was the agent of the plaintiff to hire or manage Brister, was one of the questions in the case; and we think that the evidence above quoted was relevant to this question. It is true that, as a general rule, the agency of a party must be proved by other evidence than his mere acts, before it can be properly assumed that such acts are binding on his principal.—*Scarborough v. Reynolds*, 12 Ala. 259; *McDonnell v. Branch Bank of Montgomery*, 20 Ala. 317; *McDougald v. Dawson*, 30 Ala. 553. And it may also be true, that mere acts of the assumed agent, unaccompanied by any evidence tending to show that the principal had knowledge of, or assented thereto, are not even competent evidence to be submitted to the jury upon the question of agency.—See 2 Phill. Ev. (C. & H.'s Notes, ed. 1843,) 188-9; *Scott v. Crane*, 1 Conn. 255; *Moore v. Patterson*, 28 Penn. St. R. 505 (512-13); *Forsyth v. Day*, 41 Maine, 382; *Dow v. Perrin*, 2 Smith, (N. Y.) 325; *Kidd v. Cromwell*, 12 Ala. 648 (652). But, where there is any evidence tending to show the assent of the principal to the acts of the agent, these acts, in connection with such evidence of the principal's assent thereto, should be allowed to go to the jury. And if the acts of the alleged agent are of such a nature, or so continuous in their character, as to furnish in themselves any reasonable ground of inference that the plaintiff knew of them, and would not have permitted the assumed agent thus to act in the absence of authority for so doing, the acts themselves are at least competent evidence to be submitted to the jury.—See *McDonnell v. Branch Bank*, 20 Ala. 313; *Krebs v. O'Grady*, 23 Ala. 726; *Kent v. Tyson*, 20 N. H. 121; 2 Phill. Ev. (ed. 1843),

188-9; *Cobb v. Lunt*, 4 Greenl. 503. We think that the evidence under discussion falls within this principle; and although it may be true that the acts of Desplous referred to by the witness were not of such a character as to furnish of themselves *sufficient* evidence of the principal's knowledge and assent, yet the insufficiency of the testimony is not an argument against its competency. The question of agency is matter of fact, which it is the province of the jury to decide upon; and if there is any evidence tending to prove the authority of the agent, its sufficiency and weight should be left to the jury, under proper instructions from the court.—*McClung v. Spotswood*, 19 Ala. 165.

2. In like manner, a part, at least, of the evidence of the second witness, was admissible; and the objection, being to the entire evidence, was rightly overruled. Assuming that Desplous was the agent of the plaintiff to hire Brister, the testimony that "before the negro was drowned, Desplous came down to the *Lucy Bell*, and inquired of witness about Brister", was relevant evidence, as it tended to show the agent's knowledge of, and assent to, the employment of the negro by the defendants. If Desplous was clothed with authority to "hire and look after" Brister, then the fact that he knew of, and assented to, the employment of the slave by another, would tend in some degree, however slight, to prove a hiring; and any circumstances tending to show a hiring of the slave by the plaintiff's agent to the defendants, were clearly admissible as evidence.

3. The charge asked was double, asserting two distinct propositions; one of which was, that "although Desplous was the agent of the plaintiff in hiring and looking after his negroes, this would not authorize Desplous to permit the defendants to use the negro Brister, so as to bind the plaintiff, if their original possession was unauthorized and illegal". It is clear that the property in the negro was not changed by the unauthorized and illegal possession of the defendants. The property being still in the plaintiff, his agent, empowered to hire and look after his negroes, had authority, by hiring the negro to the defendants, to legalize

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their subsequent use of him, although their prior possession was unauthorized. One of the propositions of the charge being erroneous, the court did not err in refusing it entirely, even if the other proposition was correct,—as to which it is not necessary to express an opinion.—*Slater v. Carter*, 35 Ala. 679.

Judgment affirmed.

REPORTS
OF
CASES ARGUED AND DETERMINED

AT JANUARY TERM, 1862.

ISHAM (A SLAVE) *vs.* THE STATE.

[INDICTMENT AGAINST SLAVE FOR HOMICIDE OF WHITE PERSON.]

1. *Homicide of white person by slave.*—If a slave kills a white person, believing him at the time to be a runaway negro, and being justified by the attendant circumstances in the belief, the degree of the homicide—whether murder, voluntary manslaughter, or involuntary manslaughter—is the same that it would have been if the person slain had been a runaway negro; but the punishment of the offense is that prescribed for such degree of homicide when perpetrated by a slave on a white person.
2. *Conviction of less offense than charged in indictment.*—Under an indictment charging a slave with the voluntary manslaughter of a white person, a conviction may be had for involuntary manslaughter in the commission of an unlawful act.

FROM the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case contained three counts; the first charging that the prisoner, who was a slave, the property of Capt. W. F. Hanby, “unlawfully, and with malice aforethought, killed George M. Hagood, by shooting him

with a gun;" the second, that he "unlawfully and intentionally, but without malice, killed George M. Hagood, a white person," &c.; and the third, that he "unlawfully, but without malice or the intention to kill, killed George M. Hagood, a white person," &c. The circuit court sustained a demurrer to the third count, and the prisoner pleaded not guilty to the other counts.

"On the trial," as the bill of exceptions states, "the prosecution introduced a witness, who testified, that, on the night the deceased (who was a white man) was killed, he, in company with the deceased and two other white men, went by agreement to the house of the prisoner's master, (all the white family being absent,) for the purpose of catching a runaway slave, who was said to be lurking about the place, and of detecting the prisoner in harboring said runaway, if guilty of so doing; that the deceased and himself disguised themselves, by blacking themselves, putting on old clothes, and having a budget tied up in a handkerchief; that they went near the negro house, and made a noise there, and then went to the corner of the house, and struck on it with a stick; that the dog barked fiercely during the time, and the prisoner hissed on the dog; that the prisoner came round the house, and, as soon as he got in sight, asked, 'Who are you?' that the deceased replied, 'A partner,' and, as soon as the reply was out, the prisoner fired, and killed the deceased; that he (witness) then said, 'Don't shoot, you have killed Mansfield;' that the prisoner replied, 'Lord, Massa George, why didn't you speak?' and that the prisoner remained until morning, assisting to wash and lay out the deceased, and was arrested in the morning. There was other testimony, confirming said witness, and showing that said party went to watch Capt. Hanby's house in disguise by consent and agreement with him. There was testimony tending to show, also, that some person had been seen by night about said premises, while Capt. Hanby was absent in camp drilling his company; that on the night before the killing, the prisoner had taken the gun, in presence of his mistress, and run out some distance from

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the house, and shot (as he said) at some person. It was in proof, also, that the prisoner, on the morning before the killing, asked his mistress for the gun, to carry to the field; that she refused; and forbade his having or taking the gun; and that he took the gun from the house, on the night of the killing, without the knowledge or consent of his master or mistress, and during the absence of the white family from home.

"The prisoner asked the court to charge the jury as follows: 'If the jury believe, from the evidence, that the deceased disguised himself, by blacking himself, and the manner in which he was clothed, for the purpose of deceiving the prisoner, and making him believe that he was a runaway slave; and, under such disguise, went to the prisoner's house on his master's premises, at an unusual hour of the night, between midnight and day; and there, by his disguised condition, and the manner in which he acted, deceived the prisoner; and that the prisoner, in truth and in fact, believed that the deceased was a runaway negro slave, and, under that delusion, shot and killed the deceased, then he is neither guilty of murder, nor of the voluntary manslaughter of a white person, nor of the involuntary manslaughter of a white person in the commission of an unlawful act.' The court refused this charge, and the prisoner excepted.

"The court charged the jury, that the counts in the indictment included the charge of involuntary manslaughter; to which charge, also, the prisoner excepted."

The verdict of the jury was, "Guilty of voluntary manslaughter, as charged in the second count of the indictment."

E. W. PECK, for the prisoner.—By the criminal law, a man may safely act upon appearances; and if he acts in good faith, their falsity does not in any manner increase his guilt or criminality.—*Meredith v. Commonwealth*, 18 B. Monroe, 49; *Shorter v. People*, 2 Comstock, 197. This principle is, in substance, recognized in *Oliver's case*,

(17 Ala. 587,) and in *Carroll's* case, (23 Ala. 28.) The act itself does not make a man guilty; to constitute a crime, the act and intent must both occur.—Broom's Legal Maxims, 211, 212, 221; 7 Term Rep. 514; Hale's P. C. 509. "If a man, intending to kill a thief, or a house-breaker, in his own house, happen by mistake to kill one of his own family, it cannot be imputed to him as a crime." 3 Cro. Rep. 538.

In this case, there was no malice of the will—no corrupt intent on the part of the prisoner. In the absence of his master and mistress, he was left at home the guardian and protector of their house and property. Danger of mischief was justly apprehended, some unknown person, supposed to be a runaway slave, having been seen prowling about at night. The deceased and his party disguised themselves as runaway slaves, and, by their conduct, induced the prisoner to believe that they were in fact what they assumed to be. Acting on this belief, the prisoner committed no crime in attempting to protect his master's house and property. If his act was not strictly lawful, it was at least excusable. As to the degree of caution which must be exercised, where a homicide is committed under an honest mistake of fact, see Foster's Crown Cases, 263–65.

2. The affirmative charge of the court is erroneous.

M. A. BALDWIN, Attorney-General, *contra*.—1. The charge asked by the prisoner asserts three distinct propositions, each of which is untenable; namely, that the prisoner, on the facts supposed, would not be guilty of any one of the three specified offenses—murder, the voluntary manslaughter of a white person, or the involuntary manslaughter of a white person in the commission of an unlawful act. As murder, when committed by a slave, whether by killing a white person or a negro, is precisely the same offense, and subject to the same punishment, the first proposition is manifestly erroneous. As the prisoner was guilty of an unlawful act in having the gun, (Code, § 1012,) as well as in shooting it, he was at least guilty of

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the involuntary manslaughter of a white person in the commission of an unlawful act; to constitute which offense, a knowledge of the *status* of the person slain is not a necessary ingredient; consequently, the last proposition asserted by the charge is also erroneous. Whether the prisoner was guilty of voluntary manslaughter, or the voluntary manslaughter of a white person, depended upon other facts than those hypothetically stated in the charge, and was to be determined by a consideration of all the facts in the case. Although, to constitute a crime, an evil act and an evil intent must both concur; yet a man may intend to commit one wrong, and, failing in it, commit another; in which case, the wrong intended and the wrong done coalesce and create the crime.—1 Bishop on Criminal Law, 254; Wharton, § 965. The mere fact that the prisoner believed the deceased to be a runaway slave, would afford him no protection, if he had the means of ascertaining the true facts, and did not do so.—1 Bishop's Crim. L. 242; Wharton, § 1005; *Barnes v. State*, 19 Conn. 398; *Commonwealth v. Marsh*, 7 Metcalf, 472; *United States v. Liddle*, 2 Wash. C. C. 205; *United States v. Ortega*, 4 Wash. C. C. 530; *United States v. Benners*, 1 Baldwin's C. C. 240.

2. The affirmative charge of the court is sustained by the decision in *Henry's* case, 33 Ala. 389.

A. J. WALKER, C. J.—The charge asked by the prisoner, and refused by the court, involves the assertion, that the prisoner could not be guilty of murder, because the homicide was committed under the delusion that the deceased was a runaway slave, and that delusion was justified by the attendant circumstances. In so far as the charge involves that assertion, it was obviously wrong. A homicide, committed by a slave, under such circumstances as would constitute murder, would be the same offense, and subject to the same punishment, whether the deceased was a white person or a negro; and it could make no difference, in that case, that the prisoner supposed the deceased to be slave.—Code, § 3312.

The charge, however, was designed to assert, that a slave, slaying a white person, under the delusion and belief, justified by the circumstances, that the person killed was a runaway negro, would not be guilty of the voluntary manslaughter of a white person, nor of the involuntary manslaughter of a white person in the commission of an unlawful act; although, if the appearances had been true, he would have been guilty of the voluntary or involuntary manslaughter of a slave. This proposition is important, because a higher grade of punishment is prescribed, where those offenses are perpetrated by a slave upon a white person, than is prescribed where they are perpetrated upon a negro.—Code, §§ 3313, 3314. To support the proposition, it is asserted as a correct principle, that the guilt of a party of any particular offense is to be determined in the light of the circumstances as they appeared to him; and that, therefore, the prisoner cannot be guilty of the manslaughter of a white man, because it falsely appeared to him that the object slain was not a white man. We do not concede the principle so asserted, in the latitude in which it is thus stated. It stands opposed to the doctrine which authorizes a conviction of one offense, when the accused committed it while designing and endeavoring to perpetrate another.

The true doctrine, as we conceive, is, that “where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believes them to be, he is legally, as he is morally innocent.”—1 Bishop’s Cr. Law, § 242. The charge asked and refused is at war with this principle; for it assumes that, no matter what the degree of guilt which would have existed if the appearance that the person slain was a negro had been true, the accused can not be guilty of the homicide, in any of its degrees, of a white person. The effect of it is, that although the accused would have been guilty of the murder or manslaughter of a negro, if the appearances had been true, he cannot be guilty of the murder or manslaughter of a white man, the appearances being false. The inevitable result of this doctrine would

be, that the accused, although guilty of murder or manslaughter, could not be convicted of any offense. He could not be convicted of killing a negro, because in fact he killed a white man ; and he could not be convicted of killing a white person, because the appearances superinduced and justified the belief that he was killing a negro.

It is not indispensable to the constitution of a crime, that the prisoner should commit the very act intended. Certainly, there must concur a wrongful intent, and a wrongful act. But he who, aiming to accomplish one wrongful act, fails in that, but perpetrates another, is not excused. The wrongful intent, and the wrongful act, are said to coalesce and make the crime.—Bishop on Cr. Law, § 254. Numerous illustrations of this doctrine are to be found in the books. Where there is a design to commit a felony, and a homicide ensues, against or beyond the intent of the party, he is guilty of murder ; but, if the intent went no further than to commit a bare trespass, it will be manslaughter.—1 East's Cr. Law, 255. If A gives a poisoned apple to B, intending to poison B ; and B, ignorant of it, gives it to a child, who takes it and dies, A is guilty of the murder of the child, but B is guiltless. And so, if one, out of malice at A, shoots at him, but misses him, and kills B, it is no less murder than if he had killed the person intended.—Wharton's Cr. Law, § 965. These illustrations will suffice to show, that to the conviction of a slave for the homicide of a white man, it is not indispensable that there should exist an intent to kill a white person, or even a knowledge that the deceased was a white man. Indeed, one may be guilty of involuntary manslaughter, where there was no intent to kill. A homicide, resulting from an attempt to commit any unlawful act, would be manslaughter ; and therefore, if a slave should shoot unlawfully at a beast, and by chance kill a white person, he would be guilty of the involuntary manslaughter of a white person in the commission of an unlawful act, although he might be ignorant of the proximity of the person slain. Surely, the crime could not be less, if the purpose was to kill a negro instead of a beast ;

and yet such is the conclusion to which the argument for the prisoner would lead. The statute does not make a knowledge that the deceased was a white person an ingredient of the offense, and we cannot decide that it is. There being a criminal intent, the defendant is guilty, notwithstanding he was mistaken as to the person upon whom his unlawful purpose fell.—See the authorities collected in 1 Bishop on Cr. Law, § 247, and on the attorney-general's brief.

The 15th of Lord Bacon's maxims is as follows: "*In criminalibus, sufficit generalis malitia intentionis, cum facto paris gradus.*"—3 Bacon's Works, 238; Broom's Legal Maxims, 238. In reference to this maxim, the learned author says: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which, though it be not the fact at which the intention of the malefactor leveled, yet the law giveth him no advantage of that error, if another particular ensue of as high a nature." We do not find this maxim so recognized by subsequent writers on the criminal law, and by those adjudging criminal causes, as to induce us without hesitation to adopt it as a correct exposition. The explanation of the maxim would seem to imply, that, to constitute the crime, it is only necessary that the act should be of as high a nature as the intent; and not to imply a denial that the crime might take its complexion from an act of criminality higher than the intent. If this be the construction, it would not aid the accused. If the maxim import that there must be a perfect correspondence between the intent and the act, it can not be harmonized with principles too well established to be controverted. A homicide, not intended, but committed, in the perpetration of burglary or arson, would be murder, notwithstanding the offenses intended are not, in our law, of as high a grade, or subject to as severe penalties, as murder. We shall not engage in any speculation as to the true import and operation, or the authority, of the maxim, but shall content ourselves with announcing the conclusion, that we

cannot be led by it to oppose the proposition which we now proceed to state, as follows :

A slave, who kills a white man, intending to kill a negro, is guilty of a criminal homicide in the degree in which he would have been guilty if the person slain had been a negro; and he is subject to the punishment prescribed for the commission of the offense upon a white person. The maxim, in its literal translation, only requires, that the act should be of equal grade with the intent; not that the same punishment should be incident to the thing done as to the thing intended. Crimes may be of the same degree, and yet subjected by law, founded in public policy, to different punishments. The manslaughter of a white man by a slave, and the manslaughter of a negro by a slave, belong to the same degree of homicide, and yet are subjected to variant punishments. So, also, manslaughter committed with a bowie-knife, and manslaughter committed with a different weapon, are offenses of the same degree, and yet there is a distinction made in the punishments prescribed. Numerous other illustrations might be drawn from our criminal law. In all those cases, as in this, the difference is not in the degree, but in the punishment; and the difference in the punishment is the result of some incident to the crime, which from public policy the law makes an aggravation. If, therefore, we take the maxim in its literal import, we find nothing inconsistent with our position.

In the case of *Bob v. The State*, (29 Ala. 20,) it was argued, that the prisoner, a slave, when committing an assault and battery upon another slave, by accident struck and killed the deceased, who was a white person. In reference to that aspect of the case, this court said : " We hold, that if a slave, in the attempt unjustifiably to commit an assault, or assault and battery, on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter, under section 3312 of the Code." This is an express adjudication of the point made in this case, that a slave can not be guilty of the manslaughter of a white

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person, when the intent was aimed at a negro. If one intending to beat a negro, and unintentionally killing a white person, is guilty of the homicide of a white person; *a fortiori*, is a slave thus guilty, when, intending to *kill* a negro, he by mistake kills a white person.

[2.] We are content to abide by the decision in *Henry's* case, 33 Ala. 389. Upon the principle of that decision, the accused might be convicted of the involuntary manslaughter of a white person, under a count for the voluntary manslaughter of a white person. There was, therefore, no error in the charge given by the court.

The judgment of the court below is affirmed, and its sentence must be executed, as therein ordered.

THE STATE vs. LEE & NORTON.

[APPLICATION TO COMMISSIONERS' COURT FOR CORRECTION OF TAX ASSESSMENT.]

1. *Tax on auction sales*.—The tax imposed by law on the gross amount of auction sales, (Code, § 391, subd. 17,) is to be assessed against and paid by the auctioneer, and not by the owner of the property sold.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. NAT. COOK.

THE appellees in this case, who were licensed auctioneers in the city and county of Montgomery, applied to the commissioners' court of said county, at its April term, 1861, for an amendment and correction of the taxes assessed against them for the tax year ending on the 1st of March, 1860; alleging in their petition, that, during said tax year, they had sold at auction in said city real estate belonging to divers persons, the proceeds of which sales amounted in the aggregate to \$43,742 50, and that the county assessor had assessed against them a tax of one per cent. on the

gross amount of said sales ; which tax, as they insisted, ought to have been assessed against the several owners of said real estate, who were shown to be resident citizens of said county. The commissioners' court held the assessment correct, and refused to make the proposed amendment ; and the appellees then removed the proceedings, by *certiorari*, into the circuit court. The circuit court overruled a demurrer to the petition, reversed the judgment of the commissioners' court, and ordered the assessment to be amended as asked by the petitioners. Exceptions were reserved on the part of the State to these several rulings of the circuit court, and they are here assigned as error.

M. A. BALDWIN, Attorney-General, for the State.

JNO. A. ELMORE, *contra*.

STONE, J.—Section 391 of the Code declares, that “Taxes are to be assessed by the assessor in each county, on and from the following subjects, and at the following rates :” * * * Subd. “17. On the gross amount of all auction sales made in or during the tax year preceding the assessment, except cargo sales of foreign imports, those made by executors, administrators and guardians, as such, by order of court, or under legal process, and under any deed, will or mortgage ; on every hundred dollars, and at that rate, one dollar.”

The present record raises the question, whether this tax of one per cent. is to be paid by the auctioneer, or by the owner of the property sold. We hold that the auctioneer is the party who must pay this tax; for the following reasons : Section 392 of the Code declares, that “All persons engaged in any business or pursuit, the receipts, sales, commissions of which, or capital employed, are subject to assessment under the preceding section, must keep correct accounts of the same for the tax year preceding such assessments, and exhibit the results of the same to the tax-collector, verified by oath.” We suppose this is a verbal inaccuracy, and that the meaning is, that it shall be exhib-

ited to the tax-assessor. Thus construed, it would seem to contemplate that the subjects of taxation should be rendered in by the auctioneer. It is difficult to conceive why taxables should be rendered in by one person, and the assessments made against another. But section 410, subdivision 3, is still more explicit. It declares, that assessments are to be made "on all sales and purchases subject to taxation, to the person making the same, or his agent, in the county in which such sales or purchases are made." In addition to these plain indications in the statutes, we can well conceive of a legislative policy which would select a resident auctioneer, rather than a possibly non-resident proprietor, from whom to collect the assessments on auction sales. This policy, we think, was carried into the legislation.

The judgment of the circuit court is reversed; and this court, proceeding to render such judgment as the circuit court should have rendered, doth hereby order and adjudge, that the petition of the appellees, Messrs. Lee & Norton, be dismissed, at their costs, in the circuit court and in this court.

KINNEY *vs.* THE STATE.

[INDICTMENT FOR DISTURBANCE OF RELIGIOUS WORSHIP.]

1. *What constitutes offense.*—To constitute an interruption or disturbance of "an assemblage of people met for religious worship," (Code, § 3257,) it is not necessary that the interruption or disturbance should be made during the progress of the religious services: if made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain in the house, and before a reasonable time has elapsed for their dispersion, the offense is complete.

FROM the Circuit Court of Winston.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case charged, that the prisoner "willfully interrupted or disturbed an assemblage of people met for religious worship, by noise, profane discourse, or rude or indecent behavior, at or near the place of worship." "On the trial," as the bill of exceptions states, "the prosecution adduced testimony tending to show that, within twelve months before the finding of the indictment, and in said county of Winston, the defendant willfully interrupted and disturbed an assemblage of people met for religious worship, by using profane language, cursing and swearing, and by loud noise and rude behavior, at or near the place of worship. The defendant proved, that, at the time of said interruption and disturbance as aforesaid, the religious services had been concluded, the preacher had dismissed the congregation, and the people were about to disperse; a small portion of them having gone into the yard, while the remainder were still in the house where the religious services were held. On this evidence, the defendant asked the court to instruct the jury, that, if they believed the evidence, they must find the defendant not guilty; which charge the court refused to give, and the defendant excepted to its refusal."

E. W. PARKER, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—Section 3257 of the Code enacts, that "any person, who willfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by any other act at or near the place of worship, must, on conviction, be fined not less than twenty, or more than two hundred dollars, and may be imprisoned not more than six months."

In Tennessee, the statute on this subject provided, that "if any person shall interrupt a congregation assembled for the purpose of worshipping the Deity, such person shall be dealt with as a rioter at common law." On the

trial of an indictment founded on the act just cited, it was proved that, after the services were over, and the congregation had been dismissed, and begun to leave, some being still in the church, some in the church-yard, and others left for home, the defendants, with others, excited and disturbed the congregation, by cursing, swearing, fighting, &c., there then being present a good many ladies and gentlemen. Upon these facts, the defendants asked the court to charge, that if the worship had closed, and the congregation had been dismissed, and had begun to disperse, part having left the ground at the time the disturbance occurred, then the defendants could not be convicted. This the court refused, but charged the jury, that if the worship had ceased, and the congregation had been dismissed, then, unless a reasonable time had elapsed for the dispersion of the congregation after such dismissal, the defendants would be guilty, if they did acts calculated to disturb those on the ground. On appeal to the supreme court, it was decided, that there was no error in the rulings of the circuit judge; the court holding, that the act not only protects from disturbance a congregation while actually engaged in worship, but extends its protection also to all congregations which had assembled for the purpose of worshipping; and that this protection continues, from the time the congregation so assembles, until it disperses and ceases to be a congregation.—*Williams v. The State*, 3 Sneed, 313.

This decision, which we readily adopt as a correct construction of our own statute, is precisely in point in the present case, and shows that the court did not err in refusing the charge asked by the defendant.

The language of the Virginia act on the same subject is: "If any person shall, on purpose, maliciously, or contemptuously, disquiet or disturb any congregation assembled in any church, meeting-house, or other place of religious worship," &c. And it has been held in that State, that the statute is applicable, not only to disturbances made while the religious services are progressing, but also to disturbances made while the congregation is assembled for

worship, though it be at night, on a Methodist campground, after the services are over for the day, and the worshippers are retired to rest.—*Commonwealth v. Jones*, 3 Grattan, 264.

Judgment affirmed.

STONE, J., not sitting.

CHEEK vs. THE STATE.

[INDICTMENT AGAINST OWNER FOR NEGLIGENT TREATMENT OF SLAVES.]

1. *Joinder of offenses in indictment.*—An indictment, which charges that the prisoner, being the owner of certain slaves, “did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age,” (Code, §§ 3297-98,) is not objectionable for duplicity, although a conviction might be had on proof of negligent treatment in any one of the specified particulars; nor does the joinder of the names of several slaves, in the same count, render it obnoxious to that objection, although a conviction might be had on proof of the negligent treatment of any one of them.
2. *Description of slaves in indictment.*—In such an indictment, slaves whose names are to the grand jurors unknown, may be thus described: if by the use of due diligence their names cannot be ascertained; but, if it is shown on the trial that, at the time the indictment was found, their names were in fact known, or could have been ascertained by due diligence, the defendant will be entitled to an acquittal as to them; yet proof of the single fact that their names were known at the time of the trial, without more, would not entitle him to an acquittal.
3. *Election by prosecution.*—Under such an indictment, charging the negligent treatment of several slaves, if it should appear on the trial that the offenses as to the several slaves were distinct, it would be the duty of the court to compel an election by the prosecution; yet, if all the slaves are on the same plantation, and the defendant's conduct towards all of them in the aggregate is relied on for a conviction, there is no ground for such compulsory election.
4. *Opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.
5. *Relevancy of evidence, as showing quantity of meat furnished to defendant's slaves.*—The indictment having been found in May, 1850, and the

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prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that meat was afterwards supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves.

From the Circuit Court of Lowndes.

Tried before the Hon. JOHN K. HENRY.

THE indictment in this case was found at the May term, 1860, and contained but a single count, which was as follows: "The grand jurors of said county charge, that, before the finding of this indictment, Randall Cheek was the master, or person standing in that relation to certain slaves, to-wit, Bob, Anderson, and Mose, and divers others whose names are to the grand jurors aforesaid unknown, and, as such, did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age." The defendant demurred to the indictment, but the causes of demurrer assigned are not stated in the record. The court overruled the demurrer, and he then pleaded not guilty.

On the trial, as appears from the bill of exceptions, the State introduced one Snelgrove as a witness, who was the overseer on the defendant's plantation in Lowndes county, from February, until October, 1859, and who testified, that among the slaves on said plantation was one named Mose, another named Anderson, and two named Bob,—one being called "Old Bob," and the other "Short Bob." "The State then proved, by said witness, the amount of food which was furnished to said Mose during the period of twelve months before the indictment was found, for the purpose of showing that he was not sufficiently fed; and the proof, as to Mose, tended to show this fact. The State then proposed to make the same proof as to Anderson and the two Bobs; to which the defendant objected, on the ground that the State had elected to proceed for the offense of not sufficiently feeding the slave Mose, and because the

two Bobs were not sufficiently described in the indictment; which objection the court overruled, and admitted the evidence, and the defendant excepted." The court also allowed the prosecution, against the defendant's objection, to make the same proof in reference to the other slaves on the defendant's said plantation, not named in the indictment; and the defendant reserved an exception to the admission of this evidence.

The only evidence adduced by the prosecution, in reference to the manner in which the slaves were fed, was the testimony of said Snelgrove, who stated that, "while he was overseer on said plantation, said slaves were each allowed, by the direction of the defendant, only one quarter of a pound of bacon per day, and no other meat, and were not allowed any bacon at all on Sunday; that they were also allowed as much corn-meal as they wanted, and, during the summer, a very few vegetables and roasting-ears, and about a pint of butter-milk per day, and sometimes a little butter." It was also shown that said Snelgrove, in addition to the time he was in defendant's employment, had only served as an overseer about eight months during the year 1858. The court allowed him to testify, against the defendant's objection, "that one and a half pounds of bacon per week was not, in his opinion, sufficient for each of said slaves, with the other food furnished to them as above stated; and that less than three pounds, or three and a half, per week, was not a sufficient quantity of bacon for a plantation slave;" and to the admission of this evidence the defendant also reserved an exception. Snelgrove having testified, on the part of the State, "that all the meat on the defendant's plantation was consumed by midsummer, 1859, and that meat was afterwards carried there from the defendant's house," the defendant offered to prove that, "in December, 1858, he had thirty-three hogs killed on said plantation, for the use of the plantation, and that the meat (the quantity of which was shown) was kept on the place." The court rejected this evidence, and the defendant excepted. After the evi-

dence was closed, the defendant again asked the court to compel the State to elect for which one of the slaves named in the indictment it would proceed, and reserved an exception to the refusal of the court to compel such election.

BAINES & NESMITH, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The statute under which the indictment was framed, is as follows: “Any master, or other person standing towards the slave in that relation, who inflicts, or allows another to inflict on him, any cruel punishment, or fails to provide him with a sufficiency of healthy food or necessary clothing, or to provide for him properly in sickness or old age, or treats him in any other way with inhumanity, on conviction thereof, must be fined not less than twenty-five, or more than one thousand dollars.” Four of the penal omissions mentioned in this statute are charged in one count. The allegations of these omissions are joined conjunctively; for to say of one, that he failed to do either of two or more things, implies a failure in all. Therefore, the statute which authorizes the charging, *in the alternative*, of offenses of the same character and subject to the same punishment, has no influence upon the propriety of the joinder in this case.—Code, § 3506. But, without the aid of any statute, charges of the different penal acts and failures mentioned in the section above copied may be joined in a single count. They are described in the same clause, and subjected to the same punishment. The statute, in stating several acts of kindred criminality in the disjunctive, and prescribing a punishment for the commission of one or the other of them, is understood to condemn one offense, and to specify different modes of committing it. It has, therefore, been decided, that the joinder of the charge of the respective acts in the same count is rather a charge of the same offense in the various modes of its commission, or in the different grades of it, and that, therefore, the count is not obnoxious to the

objection of duplicity. The accused may be convicted of either of the specified modes of offense.—*Stevens v. Commonwealth*, 6 Metcalf, 241; *Murphy v. State*, 6 Ala. 846; 1 Bishop on Cr. Law, 535; *Mooney v. State*, 8 Ala. 328; *Ben v. State*, 22 Ala. 9; *Ward v. State*, *ib.* 16; *Swallow v. State*, *ib.* 20; *State v. Slocum*, 8 Blackford, 315; *Regina v. Bowen*, 1 Car. & Kir. 501; *Iowa v. Abrahams*, 6 Iowa, (Clark,) 117; *Long v. State*, 12 Georgia, 293; *State v. Meyer*, 1 Spears, 305.

The indictment charges the commission of the offense in reference to three slaves designated by name, and divers others to the grand jurors unknown. The perpetration of the different species of offense specified in section 3297, upon any *one* slave, is indictable. That is made clear, alike by the language of that section, and of the next following section, which declares, that it shall “be sufficient to charge that the defendant did inflict on *a* slave any cruel punishment, or that he failed to provide *him* with a sufficiency of healthy food,” &c. That two or more distinct offenses cannot be joined in the same count, is a general rule of the law; but there are exceptions to it. One of these exceptions is, that the different offenses which are the result of the same act, and are parts of the same transaction, may be joined in the same count.—1 Archbold’s Cr. Pl. 95–96. Practical illustrations of this exception are found in indictments for burglary and larceny after entering the house.—Barbour’s Cr. Law, 319; Arch. Cr. L. 96. Then, whether or not the indictment in this case is obnoxious to the objection of duplicity, depends upon the question, whether the offenses as to the different slaves were parts of the same transaction, or the result of the same conduct on the part of the defendant. Duplicity is an objection which must affirmatively appear from the indictment. It is not an objection to an indictment, that the offenses it charges may belong to distinct transactions. Does it, then, affirmatively appear in this case, that the distinct specifications of offense as to the different slaves were the result of distinct acts on the part of the accused?

We think it does not. It is conceded, that the distinctness of the causes of offenses might appear from the nature of them. There are offenses which are incapable of a common origin. Such is not the character of the offenses alleged in this case. A planter may, by an order, or act, or omission, common in its effects, withhold from all his slaves a sufficiency of healthy food and necessary clothing, and from his sick and aged slaves a provision suitable to their respective conditions. Where this is the case, a joinder of the offenses, in reference to all the slaves coming within the operation of the common cause, is permissible. No hardship from such a joinder results to the accused; for his defense, like the charge, centres in a common point. Indeed, he derives an obvious advantage from the joinder, in meeting in a single count the accumulated charge of misconduct in reference to all the slaves affected, rather than incurring the vexation and peril of numerous separate prosecutions.—*State v. Johnson*, 3 Hill's Law (S. C.) R. 1. If it should be disclosed in the progress of the trial, that the offenses as to the different slaves were distinct, the court would, by compelling an election on the part of the State, protect the accused from the injury of being compelled to answer as to diverse transactions under the same count.—*People v. Adams*, 17 Wendell, 475; *Regina v. Bleasdale*, 2 Car. & Kir. 765.

We have looked into the books, and find the leading principle upon which we have proceeded supported by several decisions. In *Rex v. Benfield and Saunders*, (2 Burr. 980.) the court sustained a count which charged the singing in the street of songs libellous of the prosecutor, and of his son, and of his daughter. In *Regina v. Giddins and others*, (Car. & Marsh. 634,) the objection of duplicity was overruled, where a single count charged an assault upon George Pritchard and Henry Pritchard, and stealing from George Pritchard two shillings, and from Henry Pritchard one shilling and a hat, on a given day. It is said in 1st Hale's Pleas of the Crown, 531, that if one at the same time steals goods of A, of the value of sixpence, goods of

B, of the value of sixpence, and goods of C, of the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony. So, in *Thomas' case*, reported in 2d East's Cr. L. 934, a count was sustained, which alleged the uttering and publishing as true twenty-four false forged and counterfeited receipts for money.

In a still later case in England, the accused was charged with stealing coal from the mines of thirty-one different proprietors, which was brought up through a shaft leased by him; and the indictment was held not to be obnoxious to the objection of duplicity.—*Regina v. Bleasdale*, 2 Car. & Kir. 765. It appeared that the different larcenies had been committed by undermining from the defendant's shaft; and the court refused to compel the prosecutor to elect, and decided that, so long as the coal was gotten from one shaft, it was one continuous taking, though the working was carried on by different levels and cuttings, and into the lands of different people. The court, however, advised the prosecution to confine its attention to the taking from one owner.

In the case of the *People v. Adams*, (17 Wend. 475,) it was held, that an indictment, which alleged an illegal sale of different kinds of liquors, on a given day, to divers persons, was not bad for duplicity, and that it must be understood as averring only one transaction. The supreme court of Vermont sustained an indictment, which charged that the defendant broke and entered one man's house with intent to steal his goods, and, having so entered, stole another man's goods.—*State v. Brady*, 14 Verm. 353. The decision is put upon the ground, that the burglary and larceny, although to the detriment of different persons, belonged to the same transaction, and might be joined in the same count. So, the supreme court of Rhode Island decided, that a criminal complaint of an assault on two persons was not bad, considering the assault on both the result of the same act.—*Kinney v. State*, 5 Rhode Isl. 385. And in *Commonwealth v. Williams*, (Thacher's Cr. Cas. 84,) it was

held, that where goods, belonging to different persons, are stolen at one time and place, the offense may be set forth in one count. So, also, in this State, it has been decided, that a count which charged that the defendant administered poison to three persons, is not bad for duplicity. *Ben v. State*, 22 Ala. 9. See, also, *Shaw v. State*, 18 Ala. 547; *Rasmek v. Commonwealth*, 2 Vir. Cas. 356. See, also, *Com. v. Tuck*, 20 Pick. 356.

We think the joinder in this case is authorized by the principle to be extracted from the cases above collected, and we decline to sustain the objection for duplicity.

[2.] It is further objected to the indictment, that it charges an omission of duty, not only as to three named slaves, (Bob, Anderson, and Mose,) but *as to divers others, whose names were to the jurors unknown*. In the cases of *Francois v. State*, (20 Ala. 83,) *Brown v. Mayor of Mobile*, (23 *ib.* 722,) and *Starr v. State*, (25 *ib.* 38,) it was decided, that such a mode of averment was not permissible, where the offense was trading with slaves. The reason given for those decisions is, that the absence of the master's consent was an element of the offense, and that the accused could not be prepared to defend himself, by showing the necessary consent, unless he had information of the name of the slave with whom the alleged trading was done. In the first named of those cases, the court say: "If the trading with a slave was an offense, without any other constituent, we see no reason why the indictment might not allege his name as unknown to the jurors, if such was the fact, without in the slightest degree impairing the ability of the accused to defend." It is apparent; therefore, that those decisions lay down a rule applicable to a particular class of cases, and not a general principle of criminal pleading. We think the general rule is, that where the names of third persons are unknown, and cannot be ascertained, they may be mentioned in the indictment as persons whose names are to the grand jurors unknown.—1 Chitty on Pleading, 212; 1 Arch. Cr. Pl. 80, 81, 82; Wharton's Am. Cr. Law, § 251. If it should appear that the name was in fact

known when the indictment was found, or could have been ascertained by the use of due diligence, it seems that the defendant would, upon the trial, be entitled to an acquittal as to the slaves so improperly described as unknown.—See the authorities above. We must, for these reasons, hold the indictment on its face unobjectionable, because the names of some of the slaves are stated as unknown to the jurors.

It appears, however, that on the trial evidence was introduced, charging the accused as to slaves whose names were at that time known, but are not mentioned in the indictment. It is not shown, however, that the names of those slaves were not unknown, and incapable of ascertainment, at the time of the finding of the indictment. If they were unknown, and incapable of ascertainment, when the indictment was found, the defendant would not be entitled to an acquittal in reference to them, because their names were afterwards ascertained, and were known at the time of the trial.—*Com. v. Hendire*, 2 Gray, 503; *Whar. Am. Cr. Law*, § 251. The bill of exceptions is not inconsistent with the supposition, that the names were not discovered, and not capable of discovery, until after the indictment was found. We can predicate no ruling, in favor of the defendant, upon the isolated fact, that the names were known at the time of the trial. There was no error, under the facts disclosed, in allowing proof as to slaves not named in the indictment.

[3.] We think it results from what we have already said in passing upon the indictment, that the court was not bound to restrict the State to a prosecution for misconduct as to any one or more particular slaves, as it appears that all the slaves were on a single plantation, and the conduct of the accused as to the slaves on the plantation aggregately was the evidence relied on for his conviction. The conduct of the accused as to the feeding of each slave seems to have been a part of one general transaction applicable alike to all. If, however, it had appeared on the trial, that the offenses as to the different slaves were dis-

tinct, it would have been the duty of the court to compel an election on the part of the prosecution, and thus protect the accused against being compelled to answer as to divers transactions under the same count.

[4.] The witness introduced by the State had been an overseer on plantations for sixteen months. When we consider the closeness of observation which overseers on plantations are compelled to make, of the food consumed by slaves, and of their health and capacity to labor, we are constrained to regard one who has pursued that business for sixteen months as competent to give his opinion in reference to the amount of food which is sufficient for a plantation slave.—*City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 ; *Johnson v. State*, 35 Ala. 370 ; *McCreary v. Turk*, 29 Ala. 244.

[5.] It was shown that, about the middle of the summer of 1859, the meat on the defendant's plantation, where the slaves were kept, had been consumed, and that afterwards meat was supplied from defendant's residence. That proof being before the jury, the defendant proposed to show that, in December, 1858, a certain ascertained quantity of pork had been provided on the plantation, and kept on it. This evidence, which was rejected by the court, had, when taken with what had been previously proved, a manifest bearing upon the question of the amount of meat which the negroes had received and consumed ; and the court erred in rejecting it. For this error, the judgment of the court below must be reversed.

We do not think it necessary for us to notice the other numerous questions of evidence presented by the bill of exceptions. Some of them are not very important, and the others may not arise again.

Reversed and remanded.

STONE, J., not sitting.

EX PARTE COBURN.

[APPLICATION FOR MANDAMUS TO PROBATE JUDGE.]

1. *Jurisdiction of probate judge to revise proceedings of magistrate under peace-warrant.*—A probate judge has no jurisdiction, on *habeas corpus* or otherwise, to revise an order made by a justice of the peace, requiring a party to give security to keep the peace, and directing his imprisonment until such security is given: the only mode of revising the action of the justice, is by an appeal to the circuit court under section 3351 of the Code.

APPLICATION by Thomas S. and Edward Coburn for a *mandamus* to the probate judge of Lowndes county, requiring him to allow them to adduce evidence before him, on *habeas corpus*, showing the illegality of their confinement by the sheriff of said county, as hereinafter stated. The exhibits to the petitioners' application showed, that they were arrested, on the 17th December, 1861, under the warrant of a justice of the peace, issued on the complaint of one Jacob Bruce, charging them with a breach of the peace and other apprehended violence; that on the trial before the justice, he made an order, requiring them to give security to keep the peace, and directing their confinement by the sheriff until such security was given; that they then applied to the probate judge for the writ of *habeas corpus*, which was granted; that on the hearing of the *habeas corpus*, the sheriff returned the proceedings under which he held the petitioners in confinement; that the probate judge thereupon refused to examine into the validity of the proceedings had before the justice, and would not allow the petitioners to produce evidence showing their innocence of the charge imputed to them; and that they reserved exceptions to the several rulings and decision of the probate judge.

W. F. WITCHER, for the motion.

Dubose v. Dubose.

R. W. WALKER, J.—Where, on complaint to a justice of the peace, an order is made by him, requiring an individual to give security to keep the peace, and directing his imprisonment until such security is given; the probate judge has no authority, upon *habeas corpus* or otherwise, to re-examine the case upon the facts, and discharge the prisoner. The only mode of revising the decision of the justice upon the facts, is by an appeal, under section 3351 of the Code, to the circuit court, which can try the case *de novo*, and either confirm the order of the magistrate, or discharge the applicant.—Code, § 3354; *Tomlin v. State*, 19 Ala. 9. The return of the sheriff showed, that the petitioners were held in custody under an order of a justice of the peace, requiring them to give security to keep the peace; and as this order was not open to objection on any of the grounds specified in section 3744 of the Code, the probate judge had no authority to inquire into its legality or justice.—Code, § 3741; *Ex parte Burnett*, 30 Ala. 461. Consequently, the probate judge was right, in refusing to hear evidence touching the guilt or innocence of the petitioners, and properly dismissed the petition.

Motion refused.

STONE, J., not sitting.

DUBOSE vs. DUBOSE.

[PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Widow's dower and distributive share of husband's estate.*—In estimating the widow's dower interest and distributive share of the estate of her deceased husband, the value of her separate estate is to be deducted, (Code, §§ 1991-92,) although it is greater than her dower interest alone, but less than her dower interest and distributive share added together.

APPEAL from the Probate Court of Dallas.

IN the matter of the estate of William F. Dubose, deceased, on the application of Mrs. Louisa A. Dubose, who was the widow and administratrix, for a distribution of the slaves and other personal property. The commissioners, who were appointed to make the division, reported, that the value of the slaves belonging to the estate was \$37,380; that the widow owned a separate estate, the value of which was \$8,612; that they had therefore allotted to her slaves valued at \$10,078, (being one half, less the value of her separate estate,) and to Henry M. Dubose, the only child of the decedent, slaves valued at \$27,302; and that the parties in interest waived a distribution of the other personal property belonging to the estate. The widow filed several objections and exceptions to the report, but the court overruled her objections, confirmed the report, and rendered a decree accordingly; and its decree is now assigned as error. The commissioners stated, in their report, that the widow had already received her dower; and that fact was admitted, by agreement of counsel, in this court.

JONA. HARALSON, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

A. J. WALKER, C. J.—We are in this case required to define the operation and effect of section 1992 of the Code. In construing that section, it will be necessary to examine the next preceding one. We therefore copy the two, in the following words:

“§ 1991. If any woman, having a separate estate, survive her husband, and such separate estate, exclusive of the rents, income and profits, and inclusive of the increase of slaves, is equal to, or greater in value than her dower interest and distributive share of her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband's estate.

“§ 1992. If her separate estate be less in value than

her dower, as ascertained by the rule furnished by the preceding section, so much must be allowed her, as, with her separate estate, would be equal to her dower and distributive share in her husband's estate, if she had no separate estate."

The appellant has a separate estate, less in value than what would have been her dower and distributive share in the absence of a separate estate, but greater than the value of a dower interest in the estate.

It is contended on the part of the appellant, that, as her separate estate is less than dower and a distributive share, she is not within the operation of section 1991; that as her separate estate is greater than her dower, she is not affected by section 1992; and that she is, therefore, entitled to dower and distribution from her husband's estate, undiminished in consequence of her separate estate. It can not be denied that this position is unanswerable, if section 1992 is to be literally construed; for, standing upon the letter of the two sections, we find they include only the two cases, when the separate estate is equal to, or greater than the dower and distributive share, and when the separate estate is less than the dower. But we decide, that section 1992 is to be so construed as to apply to the case where the separate estate is less than the dower *and distributive* share; in other words, that the section is to be read as if the words "and her distributive share" were inserted immediately after the words "preceding section."

To sustain this decision, we invoke established rules of construction. The ascertainment of the legislative intent is the primary and cardinal object of construction, and the intention is to be sought by a comparison of all parts of the statute; and, if possible, such a construction is to be made, as will avoid inconsistency. When ascertained, the intention must prevail over the literal sense of the terms.—*Brooks v. School Commissioners*, 31 Ala. 227; 1 Kent's Com. 517, m. p. 462; Smith's Com. on Stat. and Con. Law, 662, § 515; *May v. Robertson*, 13 Ala. 86; *Wommack v. Holloway*, 2 Ala. 31; *Comm. v. Duane*, 1 Binn. 601;

Sedgwick on S. and C. Law, 237-238. It is to be considered, also, what are the effects and consequences of a law, if enforced according to its letter; and if the words, literally understood, bear either none, or a very absurd signification, we must, in the language of Blackstone, "a little deviate from the received sense of them."—1 Bla. Com. 61; Smith's Com. on Stat. and Const. Law, 550, §§ 518, 519, 523. "A statute is to be so construed as that it may have a *reasonable effect*, agreeably to the intent of the legislature." Judges, in construing laws, are to inform themselves of the previous state of the law, and the mischief to be remedied, and make such construction as will advance the remedy and suppress the mischief.—*Huffman v. State*, 29 Ala. 40; Sedgwick on S. and C. Law, 239; *Sprowl v. Lawrence*, 33 Ala. 674. And lastly, the intention of a law is often to be gathered from the cause or necessity of enacting it.—*Tennelee v. Hall*, 4 Comstock, 140; *People v. Utica Ins. Co.*, 15 John. Rep. 358, 380.

Sections 1991 and 1992 of the Code are not distinct laws, but are really parts of the same law, designed to apply to different cases involving the same question of right and justice. The principle of right and justice designed to be asserted was, that the wife's separate estate should be considered in determining the amount of her dower and distributive share of her husband's estate. The mischief to be avoided was the injustice of permitting a wife, having a *separate* estate, to receive dower and distribution to the liberal extent allowed by our general laws upon the subject; and it was the purpose of the statute to remedy that mischief. Two obvious cases, calling for an application of the remedy, are, where the wife's separate estate was equal to her dower and distributive share, and where the separate estate was less than her dower and distributive share. The same principle of justice would require that, in the former case, the wife should receive no dower or distributive share, and, in the latter, should receive dower and distributive share, diminished to the extent of her separate estate. The harmony and consistency of the two

sections can be preserved only by making that principle pervade both sections, and thus only is a consistent design to remedy the subsisting mischief preserved throughout the two sections. If the latter of the two sections is understood to apply only where the separate estate is less than the dower, it is at once placed in antagonism with the spirit which induced the enactment of the law; and besides, its operation leads to the grossest absurdity. A widow, having a separate estate less than dower, falling within the influence of the law, would have her dower and distributive share lessened by the amount of her separate estate; but if her separate estate was more than her dower, and yet less than her dower and distributive share, she would receive her dower and distributive share, undiminished on account of her separate estate. The absurdity would result, that when the separate estate increased above the amount of dower, the widow's share of her husband's estate would increase to the extent of an undiminished dower and distributive interest; and when the separate estate should be increased to an amount equal to the dower and distributive share, the widow would receive nothing from her husband's estate. The law would thus be a jumble of absurdities and inconsistencies; and the mischief to be remedied, and the intent of the legislature, would be lost sight of.

We think the rules of construction which we have collected above, are applicable to this case, and justify the construction which we have placed upon section 1992. The rule which section 1992 adopts, is this: To the separate estate is to be added such an amount from the dower and distributive share as will equal the dower and distributive share upon the hypothesis of there being no separate estate. If the widow receives her dower before the distribution of the personalty, she would be entitled only to so much of the personalty as, with the previously received dower, estimated according to the prescribed rule, would make, when added to her separate estate, a sum equal to dower and a distributive share in the absence of a separate

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estate. The ruling of the court below is, in practical result, consistent with this exposition of the statute.

Affirmed.

HURTER & HILL vs. BUFORD.

[TROVER FOR CONVERSION OF BRICKS.]

1. *Examination of defendant as witness for co-defendant.*—A defendant, against whom there is no evidence after the plaintiff has closed, may be examined as a witness for his co-defendant (Code, § 2288); but the testimony of such defendant is not to be considered by the jury, either for or against himself.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellants, suing as late partners, against Thomas Buford and P. A. Savage, to recover damages for the alleged conversion by the defendants of two hundred and fifty thousand bricks. The defendants pleaded not guilty, with leave to give any special matter in evidence. On the trial, as the bill of exceptions shows, the plaintiffs read in evidence a mortgage, executed to them by one S. G. Deas, dated the 3d September, 1858, by which the bricks, then in a kiln unburnt, were conveyed to them to secure the payment of a promissory note, which was also read in evidence; and they then proved, that the bricks were sold at auction, under a power of sale contained in the mortgage, on the 4th April, 1859, and were knocked down to them as the highest bidders. "They introduced, also, evidence of a demand of said bricks, made on their behalf, of the defendant Buford, after said sale, and before the commencement of this suit; that said demand was made at Buford's office in the city of Mobile; that Buford

replied, he was in the possession of the bricks as agent for Savage, his co-defendant, who claimed them by purchase, and he would not give them up, but referred the witness to said Savage, who was then about to leave the city; and that the witness tried to find Savage, but could not." The plaintiffs also proved the value of the bricks. "Up to this time, there was no proof of Buford's agency for Savage, nor of any possession of the bricks by Buford or Savage, nor of any refusal by Savage to permit the bricks to be hauled away, other than was contained in said declarations of Buford. Plaintiffs having then announced that they were through with their testimony, the defendant Buford offered to introduce his co-defendant as a witness, on the ground that there was no evidence against him; to which plaintiffs objected, on the ground that he was incompetent; but the court overruled their objection, and allowed said Savage to be examined, and the plaintiffs excepted."

Savage testified, in substance, that he had purchased the land on which the brick-kiln was situated, and, being compelled to leave the city before the purchase was completed, had appointed Buford his agent, to conclude the purchase for him, take care of the property during his absence, &c.; and that afterwards, "when informed by Buford of his refusal to deliver the bricks on plaintiffs' demand, he approved Buford's acts, and said that, if the demand had been made of him, he would have done the same thing." The court charged the jury, at the request of the defendant Savage, "that his testimony could have no effect as to himself, either for or against him, but must be restricted to the defendant Buford;" to which charge the plaintiff excepted.

The admission of Savage as a witness for his co-defendant, and the charge of the court, are now assigned as error.

K. B. SEWALL, for appellant.

STONE, J.—We do not think the circuit court erred in permitting the defendant Savage to testify in favor of his co-defendant, Buford. The plaintiffs had closed their evi-

dence, and, so far as we are informed by the record, there was no testimony against Mr. Savage. The case is directly within the letter of the statute.—Code, § 2288 ; *Rabby v. O'Grady*, 33 Ala. 255.

The charge excepted to presents a graver question. We do not think that the statute, allowing “a defendant, against whom there is no testimony, to be a witness for his co-defendant,” contemplates that such defendant shall be, either actually or constructively, discharged from the suit, before he is allowed to testify. The statute contains no such provision, and we do not feel at liberty to interpolate it. On the contrary, both that and the next succeeding section furnish evidence on their face that, in certain cases, and for certain purposes, parties to the record are made competent witnesses. But cases may frequently arise, such as the present one, where a defendant, testifying for his co-defendant, is necessarily compelled to give evidence which may make against himself. This may grow out of the very nature of the transaction, about which the witness testifies. He cannot decline to testify on that account; for the statute gives his co-defendant a right to his testimony, if, by a failure of proof against him, he be brought within its provisions.

We concede, that difficulties present themselves in the construction of this section of the Code; and strong objections may be urged against any rule we may adopt. We hold, however, that testimony given by a co-defendant, under section 2288 of the Code, is not to be considered by the jury, either for or against the party testifying, for the following reasons: In the first place, the statute limits the admissibility of the evidence to the issue between the plaintiff and the co-defendant, by whom the witness is placed upon the stand, and does not constitute him a general witness in the cause. Moreover, all will readily concede, that a witness, introduced under this section of the Code, does not thereby become a witness for himself. If we hold that any admission, to be gathered from his testimony, may be used by the plaintiff against him, this would

lead to the most shocking injustice, unless we allowed such witness to depose to any explanatory or rebutting fact or circumstance within his knowledge. Such explanatory or rebutting evidence would lead to embarrassing and perplexing cross-examination, and re-examination, and, in fact, to all the mischiefs which grow out of the examination of parties as witnesses in their own causes.

The judgment of the circuit court is affirmed.

McGRATH vs. McGRATH'S ADMR'S.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Widow's dissent from husband's will; what is sufficient.*—Where a widow executes in writing her dissent from her husband's will, and hands it to a friend, with instructions to file it in the office of the probate judge, and then dies; if the dissent is filed by the person to whom it was entrusted, after her death, but within the period prescribed by the statute, (Code, § 1610,) this is a sufficient compliance with the requisitions of the statute.

APPEAL from the Probate Court of Macon.

IN the matter of the final settlement and distribution of the estate of Roger McGrath, deceased, by David Clopton, his executor. E. B. Zachery and Samuel Cooper, as administrators of Mrs. Nancy McGrath, deceased, who was the widow of said Roger McGrath, appeared on the settlement, alleged that their intestate had dissented from her husband's will within the time prescribed by law, and claimed the share of the estate to which she would have been entitled if her husband had died intestate. Their claim was resisted by Dennis McGrath, one of the legatees under the will of Roger McGrath; and an issue was thereupon formed between them. To prove a dissent from the testator's will by their intestate, the administrators introduced one Mitchell

as a witness, who testified, "that said Nancy McGrath, on the 19th August, 1858, at his house, and in his presence, signed a paper, purporting to be a dissent from said last will and testament, and gave it to him, with instructions to file it in the office of the probate judge of said county; that he called at the office of the probate judge, between sunset and dark of the same day, to file said paper, but found the office closed; that said Nancy died suddenly on the 21st August, 1858, and that said paper was filed in said office on Monday thereafter, which was the 23d day of August, 1858. It was admitted, that said Roger McGrath died in April, 1858; that said Nancy McGrath was his widow, and that they had no children. This being all the evidence, the probate court decided, that the dissent was valid"; to which said Dennis McGrath excepted, and which he now assigns as error.

R. F. LIGON, for appellant.

GRAHAM, MAYES & ABERCROMBIE, *contra*.

R. W. WALKER, J.—Sections 1609 and 1610 of the Code are in the following words:

"§ 1609. The widow may, in all cases, dissent from the will of her deceased husband, and, in the place of the provision made for her by such will, take her dower in the lands, and of the personal estate such portion as she would have been entitled to in case of intestacy.

"§ 1610. Such dissent must be made in writing, and deposited, within one year from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry thereof, specifying the day on which the dissent was made, made of record."

Confining our decision to the precise facts of this case, we hold, that they show a substantial compliance with the foregoing provisions of the Code. The widow executed and published her dissent in writing, and manifested her purpose to have it deposited with the probate judge, by handing it to a friend, with instructions to file it. Where

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a widow, who has executed her dissent in writing, manifests, by some unmistakable act, her purpose to have it deposited with the proper officer, within the time prescribed by law, and actually sets on foot measures to have it done, and then dies before the deposit is made, without having, prior to her death, indicated in any way a desire to recall or revoke her dissent; and the dissent is, after her death, but within twelve months after the probate of the will, deposited with the probate judge, we think that the requisitions of the statute are satisfied. If the dissent had been simply found among the papers of the widow after her death, and then deposited by her representative, or by some third person, the question presented would have been very different. It will be time enough to decide that question when it arises. For the present, we limit our decision to the facts of the case before us.

Decree affirmed.

PHILLIPS, GOLDSBY & BLEVINS *vs.* BEENE'S
ADM'R.

[CONTEST AMONG CREDITORS OF INSOLVENT ESTATE.]

1. *What is sufficient filing of claim.*—The verification of a claim against an insolvent estate is not filed within the meaning of the statute, (Code, § 1847,) when it is merely placed by the creditor's attorney in the probate judge's office, in the box appropriated to such papers, without the knowledge of the judge or his clerk, and without calling the attention of either of them to it until after the expiration of the nine months prescribed by the statute for the filing of claims.

APPEAL from the Probate Court of Dallas.

In the matter of the estate of Benjamin Y. Beene, deceased, which was declared insolvent on the 12th April, 1858, and against which the appellants filed a claim on the

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22d November, 1858. The case was before this court at its January term, 1861, on appeal by the administrator; when the decree of the probate court, allowing the claim, was reversed, and the cause remanded.—See the case reported in 37 Ala. 312. On the second trial, as appears from the bill of exceptions in the present record, one Roberts, who was a clerk in the office of the probate judge, testified, that the plaintiffs' claim was presented and filed on the 22d November, 1858, and was so marked; "that shortly after the expiration of nine months from the declaration of insolvency, J. Q. Smith, plaintiffs' attorney, called at the office of the probate judge in Cahaba, and stated to witness, that he was informed objections had been filed to claims against said estate of which he had charge, because said claims were not verified; that Smith stated to him, at the same time, that he had the proper verifications made, and had deposited them in the box in said office in which claims against insolvent estates were kept, including the papers and claims against said Beene's estate; that said Smith and witness thereupon examined the papers in said box, but did not find there the regular file of papers belonging to Beene's estate, which was then in the possession of the defendant's attorney; that said Smith found in the box an affidavit, which had not been before noticed by witness," and which was a verification of the appellants' claim in this case, sworn to before a justice of the peace, on the 16th of December, 1858.

"James Q. Smith, one of the plaintiffs' attorneys, testified, that, having charge of said claim, he presented it to the probate judge, and had it filed, but without any verification, on the 22d November, 1858; that on the 16th December, 1858, he drew up the above affidavit in Selma, where he resided, and took it to one of the plaintiffs, who swore to the same before a justice of the peace in Selma; that he took the affidavit, on the same day, to Cahaba, and put it, with others, in the box in the probate judge's office in which claims against insolvent estates were kept, and in which, as he knew, the claims against the estate of Beene

were kept; that the affidavits were endorsed by him, 'Affidavits to be deposited with file of claims against estate of Beene;' that the file of claims against said estate was not then in the box; that his attention was first called to this matter, after the expiration of nine months from the declaration of insolvency, by being informed that objection was made to this claim for the want of a verification; that he immediately informed one of the defendant's attorneys that a verification had been made and put in the box where the papers of said estate were kept; that he went to Cahaba a few days afterwards, and requested Roberts, the clerk in the probate judge's office, to look for said verifications; that he and Roberts then looked together in the box, where he found them as he had deposited them, and that the claims against said estate were then absent from the office.

"One of the defendant's attorneys testified, also, that he received from J. Q. Smith, shortly after the expiration of nine months from the declaration of insolvency, and after objections were filed against said claims, a letter stating that a verification of plaintiffs' claim had been deposited by him in the box in the probate judge's office, to be filed with said claim; that he did not remember looking in the office for said verification until Smith next came to Cahaba, when Smith informed him that he and Roberts had found the verification in the box; that he took the claims against said estate from the probate judge's office, shortly after the expiration of the nine months, for the purpose of filing objections to them; that he examined all the papers in said box, and did not recollect seeing any more papers in the box at that time, except what he took out.

"This being all the evidence in the case, the court rejected the claim, on the ground that there was not such a filing of the verification as is required by law;" to which the plaintiffs excepted, and they now assign the same as error.

BYRD & MORGAN, for appellants.

WHITE & PORTIS, *contra*.

A. J. WALKER, C. J.—The evidence upon which the allowance of appellants' claim is now sought, differs from the evidence presented when the case was before in this court.—*Beene's Adm'r v. Phillips, Goldsby & Blevins*, 31 Ala. 312. The precise question now to be decided is, whether a verification of a claim against an insolvent estate is legally filed as required by section 1847 of the Code, when it was placed by the attorney of the claimants, within the prescribed period of nine months, in the box appropriated to such papers, in the probate judge's office, without the knowledge of the probate judge or his clerk, and was not called to the attention of either of them until after the expiration of the nine months. We deduce this precise form of the question from a consideration of the facts not proved, as well as of those proved, in connection with the legal proposition, that the *onus* of proof is upon the claimants.

The question, as stated, will be solved, by inquiring what is meant by *filing* a claim. The word *file* is derived from the Latin word "*filum*," which signifies a thread; and its present application is drawn from the ancient practice of placing papers upon a thread, or wire, "for the more safe keeping and ready turning to the same." The origin of the term indicates very clearly, that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the "string" or "wire." Accordingly, we find that filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing the paper, and the making of the appropriate endorsement by the officer.—1 Burrill's Law Dic. 625; Tomlin's Law Dic., *file*; Bouvier's Law Dic., *file*; *Holman v. Chevaillier*, 14 Texas, 337; Marriott's Law Dic., *file*. A bill in chancery is said to be filed, when it is delivered to the clerk, and he states the day when it was brought into his office, numbers it, and receives it into his custody.—1 Dan. Ch. Pl. & Pr. 454. And it is said, that when a paper is filed, it is a record.—1 Lilly's Prac. Register, 826. In *Dr. With-*

erington's case, it was said, a paper on file could "not be taken off without the consent of parliament—no, not by consent of parties," though, by consent of parties in other cases, papers have been taken from the file.—1 Keble's R. 458; 13 Viner's Abridg. 211. These authorities show conclusively, that a paper, not brought to the notice of the proper officer, and placed in his custody, can not be said to be filed. As was said in the case of *Holman v. Chevallier*, (*supra*.) where the law requires or authorizes a party to file a paper, it simply means that he shall place it in his official custody. That is all that is required of him. The party cannot be prejudiced by the omission of the officer to endorse the paper filed.

Besides the authorities we have adduced, we are led by a regard to public policy to coincide with the court below in the opinion, that the verification was not filed within the prescribed period. It would lead to many abuses and much injury to regard a paper, placed in the office without the officer's knowledge, as filed.

Affirmed.

GOVERNOR vs. READ.

[SCIRE FACIAS TO REVIVE JUDGMENT.]

1. *Payment to clerk of court.*—A clerk has no authority, before judgment, to receive payment of the plaintiff's debt; yet, if he receives the money from the defendant before judgment, retains it in his hands until after judgment, and then manifests, by some plain and unequivocal act, his intention to hold it in his official capacity as clerk, the payment is good, and the judgment thereby discharged.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellant in this case recovered a judgment against

Hiram Read, the appellee, at the September term, 1853, of said circuit court; and on the 10th September, 1859, no execution having been issued on it, sued out a *scire facias* to revive said judgment. The defendant pleaded payment, and issue was joined on that plea. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the record of the judgment sought to be revived. The day on which the judgment was rendered was not shown by the record; but the plaintiff adduced other evidence tending to show that it was not rendered on Monday, the first day of the term, which was the 26th September, 1853. To support his plea of payment, the defendant offered to read in evidence an endorsement on the original summons and complaint, signed "Thomas H. Burch, clerk," in these words: "Received, September 26, 1853, of Hiram Read, three hundred and forty-five 21-100 dollars, in full of the principal, interest, and costs in this case"; and an entry on the judge's docket at the September term, 1853, opposite the case, and immediately under the judge's entry of judgment, of the word "settled," written in pencil marks. This endorsement and entry were offered in connection with proof that they were both in the hand-writing of Thomas H. Burch; that he was at that time the clerk of said circuit court, and that he had since died. The plaintiff objected to the admission of the receipt and entry as evidence, and reserved an exception to the overruling of his objection. The plaintiff also proved an admission on the part of the defendant "that the payment to Burch was made on Monday, the 26th September, 1853, before the session of the court on that day."

"The above being all the evidence in the case, the court charged the jury, that if the defendant paid to Burch, who was at that time clerk, a sufficient amount of money to satisfy the plaintiff's judgment and costs, on the morning before the circuit court commenced, this, of itself, would not be such a payment as would relieve him, since the clerk had no right, before judgment, to receive money and receipt for it; but, if he had the money, and wrote the word '*set-*

ttled' after judgment was rendered against the defendant, and intended thereby to signify an appropriation of the money to the payment of the judgment against the defendant, (and, to gather his intention in writing the word 'settled' under the judge's entry, they might look at all the facts and circumstances in proof,) they must find for the defendant.

"The plaintiff excepted to this charge, and then asked the court to instruct the jury, that if they believed the defendant paid the amount of money due to the plaintiff in this case, to the clerk of the court, on the 26th September, 1853, before judgment was granted in the case; and that a judgment was afterwards granted in favor of the plaintiff, and against the said defendant, for three hundred and thirty-eight dollars; and that the clerk afterwards endorsed on the judge's docket, in pencil, beneath the judge's entry, the word 'settled,'—this is not sufficient, without proof when that word was written, to bar the plaintiff's right to revive the judgment. The court refused to give this charge, and the plaintiff excepted to its refusal."

The admission of the evidence objected to, the charge given, and the refusal of the charge asked, are now assigned as error.

MARTIN, BALDWIN & SAYRE, for appellant:

GOLDTHWAITE, RICE & SEMPLE, *contra*.

A. J. WALKER, C. J.—The clerk, as an officer, had no authority to accept payment of the plaintiff's debt, until judgment was rendered; and a payment to him, before judgment, would, therefore, not discharge the debt, or constitute any barrier to the revival of the judgment.—Code, § 651; *Currie v. Thomas*, 8 Porter, 293; *Murray v. Charles*, 5 Ala. 678; *Dean v. Governor*, 13 Ala. 526; *Fitzpatrick v. Br. Bank at Montgomery*, 14 Ala. 533; *Snedicor v. Davis*, 17 Ala. 472.

The court, in its charge, recognized the principle above stated, but announced that, if the clerk, having received

the money before the judgment, afterwards, still having it, wrote upon the docket, in pencil mark, beneath the judge's entry in the case, the word "*settled*," intending thereby to signify an appropriation of the money to the payment of the judgment, the judgment was discharged. This, at least, is the substance of the instruction, when construed in reference to the testimony.

After the judgment was rendered, the clerk occupied the double capacity of an agent authorized to pay off the judgment, and having the money for that purpose in his possession, and also of an officer authorized by law to receive it. The cases of persons filling the double capacity of executor and trustee authorized to receive from the executor, or of administrator and guardian of the distributee, afford, perhaps, as close an analogy as can be found in the law to the question in hand. In those cases it is held, that the executor or administrator remains chargeable, until he has made it appear, "by some plain and unequivocal act," that he has elected to hold the fund in his capacity of trustee or guardian.—*Perkins v. Moore*, 16 Ala. 9; *Davis v. Davis*, 10 Ala. 299; *Newcomb v. Williams*, 9 Metc. 525. The clerk, as an individual, having the money with which to discharge the judgment, and being as an officer authorized to receive it, might pay the money to himself in his official capacity, as he might receive it in that capacity from a third person; and this, upon the principle of the authorities above cited, would be done when, having the money, he manifested by some plain and unequivocal act an intention to hold it in his official capacity.

Such a plain and unequivocal act was done, when the clerk wrote the word *settled* upon the docket, in the manner above stated, with the intention to signify an appropriation of the money in his hands to the satisfaction of the judgment. The word "*settled*," written upon the docket by the clerk, imports that the judgment was discharged in some manner. It is in itself equivocal, in this, that it carries with it no evidence of the manner in which

the settlement was made ; but, when coupled with the additional fact, that money had previously been placed in the hands of the clerk for the purpose of discharging the judgment, and that the entry of settlement was made in reference to that fact, it becomes plain and unequivocal. It is a clear demonstration of the clerk's election to treat the judgment as discharged in consequence of the previous reception by him, and of his intention to hold the money as clerk. The charge is consistent with this conclusion, for it makes the discharge of the judgment dependent upon the fact, that the clerk's entry was made with the intent to signify an appropriation of the money previously received to the payment of the judgment.

The charge which was requested and refused, is the converse of the charge that we have decided was properly given, except that it gives prominence to the point, that the defense was not sustained unless it was shown when the entry of "settled" was made. The point made is not that it was incumbent upon the defendant to show that the entry was made after the judgment was entered, but the particular time at which it was made. So far as the question of the discharge of the judgment was concerned, it was not material to show the precise time. It was sufficient to show that the time was after the judgment was rendered ; for, at any time after that event, the clerk had the requisite authority.

The evidence objected to tended clearly to show the facts which we have decided constituted a good defense ; and, there was, therefore, no error in admitting it.

Affirmed.

LAUGHINGHOUSE vs. LAUGHINGHOUSE.

[APPLICATION TO REVOKE LETTERS OF GUARDIANSHIP OF LUNATIC.]

1. *Inquisition to be had before probate judge.*—Under the provisions of the Code, (§§ 2750-53,) an inquisition of lunacy must be tried before the probate judge, who must preside at the trial, administer the oath to the jurors, and receive their verdict when rendered: if the trial is had before the sheriff, in the absence of the probate judge, the proceedings are *coram non iudice* and void.

APPEAL from the Probate Court of Madison.

IN the matter of the petition of Joseph Laughinghouse for the revocation of letters of guardianship over his person and property, previously issued by said probate court, on the ground that he was a lunatic, to John E. Laughinghouse. The letters of guardianship were founded on an inquisition of lunacy, the validity of which the petitioner assailed and denied on several specified grounds; the principal objections being, that the inquisition was not held before the probate judge, that the petitioner was not notified of the proceedings, and that the jurors were not properly sworn. The court dismissed the petition, and refused to revoke the letters of guardianship; to which ruling and decision the petitioner excepted, and he now assigns the same as error.

JAMES ROBINSON, for appellant.

R. C. BRICKELL, *contra*.

STONE, J.—There is one fundamental error in the proceedings to have Joseph Laughinghouse declared a lunatic, which must work the reversal of this case. The writ to the sheriff directed him, not only to summon a jury, but to organize and qualify it, and to take the inquisition. We gather from the record that the trial was had before the sheriff, in the absence of the judge of probate. This was

wrong. Our statutes, conferring this statutory and summary remedy, evidently contemplate a trial before the judge of probate. He must preside at the trial, administer the oath to the jury, and receive their verdict when rendered. In this, as in other trials, the sheriff is only the ministerial officer of the law.—Code, §§ 2750-1-2-3, *et seq.*

There is nothing in these sections of the Code which in terms requires the trial to be had before the probate judge; but such is plainly inferrible from their phraseology in several places. Section 2763 declares what compensation shall be allowed to the jurors and witnesses, to be paid *on the certificate of the judge of probate*. It would be strange to require him to certify that certain services were rendered, on a trial with which he had nothing to do.

The act of 1821, (Clay's Digest, p. 302, § 30,) while it evidently permitted such trials to be had before the sheriff, directed that, "on sufficient cause shown, the judge may order any such inquisition to be had before him." Under that statute the inquisition was held which was brought to view in the case of *McCurry v. Hooper*, 12 Ala. 823. The Code evidently intended to change that rule, and to require such trials, in all cases, to be had before the judge of probate.

It follows from what we have said, that the whole proceedings had in this cause, after the petition was filed, and the appointment of a guardian for Mr. Laughinghouse, were *coram non judice* and void; and the appointment should have been revoked. The other questions presented will not probably arise again, as, on another trial, the court can conform to the statute, as to length of notice, oath of jurors, presence of the alleged lunatic, &c. We deem it unnecessary to express any opinion on those questions.

The judgment of the probate court of Madison, in refusing to revoke the appointment of John E. Laughinghouse as guardian, is reversed, and the cause remanded.

ARTHUR vs. GAYLE.

[ACTION FOR CONVERSION AND ILLEGAL SALE OF SLAVES.]

1. *When action lies between tenants in common of remainder in slaves.*—If one tenant in common of a remainder in slaves, during the existence of the particular estate, obtains possession of the slaves, and sells and conveys them as his absolute property, his co-tenant may maintain a special action on the case against him.
2. *When action lies by remainder-man against stranger.*—A sale of the absolute interest in slaves by a stranger, during the existence of the particular estate, is an injury for which an action lies in favor of the remainder-man.
3. *Admissions against interest.*—The declarations of a person who has possession of a slave, in disparagement of his own title; are competent evidence against him, or against a subsequent purchaser or sub-purchaser from him.
4. *Secondary evidence of deed.*—The existence and loss of a deed, executed in another State, having been proved by the admissions of the defendant's vendor; and also her declarations, to the effect that, after the loss of the original, she had procured a copy of the deed, and had it recorded here,—a transcript from the record, properly certified, is admissible evidence.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by John C. Arthur, Adam B. Arthur, and Martha A. Evans, against Reese D. Gayle; and was commenced on the 8th February, 1858. The original complaint contained only a single count in trover, for the conversion of two slaves, Robert and Venus; but the following counts were afterwards added by amendment:

"2. The plaintiffs claim of the defendant the further sum of five thousand dollars damages, for that on the — day of —, 18—, and before the death of Mrs. Mary H. C. Arthur, who departed this life about November, 1857, the plaintiffs, together with the defendant, were the owners, as tenants in common in remainder, of certain slaves, to-wit," Robert and Venus, "which remainder was expectant

upon the death of the said Mary H. C. Arthur; and the defendant, being wrongfully in possession of said slaves, and having full notice of plaintiffs' interest in the same as above set forth, but pretending and claiming to be the sole, absolute, and entire owner thereof, without the knowledge or consent of plaintiffs, but wrongfully intending to deprive them of all interest in said slaves, sold and delivered them to a person unknown to plaintiffs, professing, intending, and claiming, by said sale, to convey the entire interest and estate in said slaves; all of which took place before the death of the said Mary H. C. Arthur; by means whereof, the said slaves have been wholly lost to the plaintiffs.

"3. The plaintiffs claim of the defendant the further sum of five thousand dollars damages, for that on the — day of —, 18—, and before the death of Mrs. Mary H. C. Arthur, who departed this life about November, 1857, the said plaintiffs, together with Reese D. Gayle, were the owners, as tenants in common in remainder, of certain slaves, to-wit," Robert and Venus, "which remainder was expectant upon the death of the said Mary H. C. Arthur; and said defendant, being in possession of said slaves, and having full knowledge of plaintiffs' interest therein as above set forth, but claiming, pretending, and professing to be the sole, entire, and absolute owner thereof, without the knowledge or consent of plaintiffs, but wrongfully intending to deprive them of all interest in said slaves, sold and delivered them to some person unknown to plaintiffs, professing, claiming, and intending by said sale, to convey the entire and absolute interest in said property; all which took place before the death of said Mary H. C. Arthur, and by reason thereof the said slaves have been wholly lost to plaintiffs.

"4. The plaintiffs claim of the defendant the further sum of five thousand dollars damages, for that on the — day of —, 18—, and before the death of Mrs. Mary H. C. Arthur, who departed this life about November, 1857, the plaintiffs, together with one Mary M. English, were tenants in common in remainder of certain slaves, to-wit,"

Arthur v. Gayle.

Robert and Venus, "which remainder was expectant upon the death of the said Mary H. C. Arthur; and the said defendant, having wrongfully obtained the possession of the said slaves, and having full knowledge of plaintiffs' right thereto as above stated, but claiming and pretending to be the sole and absolute owner of said slaves, without the knowledge or consent of plaintiffs, and wrongfully intending to deprive them of all interest in said slaves, sold and delivered them to some person unknown to plaintiffs, professing, claiming, and intending to convey the absolute and entire estate in said slaves; all which took place before the death of the said Mary H. C. Arthur, and, by reason thereof, the said slaves have been wholly lost to the plaintiffs.

"5. The plaintiffs claim of the defendant the further sum of five thousand dollars damages, for that on the — day of —, 18—, and before the death of Mary H. C. Arthur, who departed this life about November, 1857, they were the owners, as tenants in common in remainder, of certain slaves, to-wit," Robert and Venus, "which remainder was expectant upon the death of the said Mary H. C. Arthur; and the defendant, having full knowledge of the plaintiffs' right to said slaves, but claiming to be the absolute owner thereof, wrongfully intending to deprive plaintiffs of all interest therein, sold and delivered them to a person unknown to plaintiffs, professing, claiming, and intending thereby, to convey the entire and absolute estate in said property; all of which took place before the death of the said Mary H. C. Arthur, and, by reason thereof, the said slaves have been wholly lost to plaintiffs."

The plaintiffs objected to the allowance of the amended complaint, and reserved an exception to the overruling of their objection; and they also demurred to the complaint as amended, and to each count thereof separately. The causes of demurrer assigned were—to the entire complaint, because of a misjoinder of counts; and to each of the amended counts, because it did not show that the plaintiffs had been damaged by the alleged wrongful acts of the de-

fendant, and because it did not show such a state of facts as authorized the plaintiffs to maintain the action, and because there was a misjoinder of plaintiffs. The court sustained the demurrer to all the amended counts, and the plaintiffs excepted to its ruling. The defendant then pleaded, to the count in trover in the original complaint, "the general issue, with leave to give in evidence any special matter that might be pleaded in bar;" and issue was joined on that plea.

The plaintiffs derived title to the slaves in controversy under a deed from John Singleton, dated the 18th June, 1805, which was executed in South Carolina, and by which the female ancestor of the slaves in controversy was conveyed to Mary H. C. Brisbane, (afterwards Mrs. Arthur,) "for and during the term of her natural life, and, upon her decease, to the heirs of her body lawfully begotten, who may be living at the time of her death, share and share alike; and in case she should die without leaving such issue living at the time of her death, to her executors, administrators, and assigns forever." The defendant purchased the slaves from one Darrington, who bought them from one Diggs, who bought them from Mrs. Arthur; and he conveyed them, by a deed of marriage-settlement, in October, 1851, to a trustee, for the separate use of his wife during her life, with remainder to their children by the marriage.

To prove the deed from Singleton to Mrs. Arthur, the plaintiffs took the deposition of Z. L. Bettis and Mrs. Martha B. Clary. Bettis was the probate judge of Clarke county, and he appended to his deposition a certified copy of the deed, as recorded in the orphans' court of said county on the 12th August, 1837; and it was admitted, that the deed certified by him was the only deed on record in said county from Singleton to Mrs. Arthur and her children. The testimony of Mrs. Clary in reference to the deed was as follows: "Mrs. Arthur came to Alabama, from South Carolina, about January, 1834. Witness knew her in South Carolina, and after she came to Alabama, un-

til her death. Does not know anything of an original deed, further than what she has heard Mrs. Arthur say of it. Mrs. Arthur had what she said was a deed, made by John Singleton, conveying the slaves Venus," &c., "to her during her life-time, and at her death to her children who might then be living. This deed, of which she heard Mrs. Arthur frequently speak in South Carolina, and afterwards in Alabama up to 1839, was put by witness, with other papers belonging to Mrs. Arthur, in a small writing-desk, which was put by witness in a larger box, in the latter part of 1833, in South Carolina, when packing up to remove to Alabama. The box was brought to Hamburg, South Carolina, and was left there, to be shipped to Claiborne, Alabama, by way of Mobile. The box was lost. Witness never afterwards saw the box, desk, or any of the papers. She has frequently heard Mrs. Arthur, while she had possession of Venus, say that the deed was lost; heard her say, after they arrived in Alabama, that she would send to South Carolina for a copy of the deed; and heard her say afterwards, but before 1839, that she had procured a copy of the deed, and had it recorded in Clarke county, where her negroes then were." The court suppressed, on defendant's motion, the copy of the deed appended to Bettis' deposition, and also the testimony of Mrs. Clary in reference to it; to which the plaintiffs reserved an exception, as also to other rulings of the court on the evidence.

In consequence of the adverse rulings of the court on the pleadings and evidence, the plaintiffs were compelled to take a nonsuit; which they now move to set aside, and assign as error all the rulings of the court to which they reserved exceptions.

ALEX. & JOHN WHITE, for appellants.—1. Each count in the amended complaint shows an injury to the plaintiffs' interest in remainder, for which an action lies in their favor. 1 Chitty's Pleadings, 148-9, 152; 1 Bacon's Abr. 103; *Gordon v. Harper*, 7 Term, 9; *Broome v. King*, 10 Ala. 823; *Ramey v. Green*, 18 Ala. 771; *Allen v. Harper*,

26 Ala. 689; *Perminter v. Kelly*, 18 Ala. 718; *Wilson v. Reed*, 3 Johns. 178; *Welch v. Oliver*, 21 Pick. 561.

2. The declarations of Mrs. Arthur, made while she was in possession of the slaves, and in disparagement of her own title, were competent evidence against the defendant. *Walker v. Blassingame*, 17 Ala. 813; *Pearce v. Nix*, 24 Ala. 185; *Jennings v. Blocker*, 25 Ala. 415; *Cole v. Varner*, 31 Ala. 244; *Fralick v. Presley*, 29 Ala. 457.

3. The existence and loss of the deed from Singleton were sufficiently proved to let in secondary evidence of its contents.

BYRD & MORGAN, *contra*.—1. The sale of the slaves by the defendant was a lawful act, and passed only his own interest in them. Consequently, such sale cannot be the foundation of an action by the plaintiffs, unless fraud is shown, or some special injury to their rights.

2. The execution of the deed from Singleton was not proved, nor was there any legal proof of its existence and loss. Moreover, the certified copy was but the copy of a copy, and therefore not admissible.—17 Ala. 648; 18 Ala. 65, 338; 19 Ala. 245, 653; 20 Ala. 230, 485; 22 Ala. 416; 24 Ala. 209; 27 Ala. 281.

3. The other rulings of court on the evidence are covered by the following authorities: 26 Ala. 665; 19 Ala. 353; 20 Ala. 324; 22 Ala. 501; 24 Ala. 201; 27 Ala. 216; 28 Ala. 704, 110; 29 Ala. 244.

R. W. WALKER, J.—1. The question presented by the demurrers to the second and third counts of the complaint is, whether an action is maintainable by one tenant in common of a remainder in slaves, against his co-tenant, on the ground that the latter, during the existence of the particular estate, obtains possession of the slaves, and sells and conveys them as absolutely his own. If such a sale were made after, instead of before the termination of the particular estate, it is clear, both upon principle and authority, that it would be a conversion, for which the co-tenant could

maintain trover.—*Welch v. Oliver*, 21 Pick. 559 ; *Wilson v. Reed*, 3 Johns. 174 ; *Perminter v. Kelly*, 18 Ala. 716 ; *Smyth v. Tankersley*, 20 Ala. 212 ; *Cowles v. Garrett*, 30 Ala. 350. And if upon such sale money was received, the tort could be waived, and assumpsit for money had and received maintained.—*Smyth v. Tankersley*, *supra* ; *Cowles v. Garrett*, *supra*.

The fact that the sale was made during the existence of the particular estate, however material in determining the remedy to be pursued, and the *quantum* of damages recoverable, does not impair the right of action. The reason for sustaining the action, when the title and possession are vested, applies fully when the title is vested and the possession postponed. When the title and possession are vested, the action is maintainable, because each tenant in common sustains to his co-tenant a relation of trust and confidence, for any violation of which the law holds him liable.—*Van Horn v. Fonder*, 5 Johns. Ch. 406 ; *Flagg v. Wann*, 2 Sumner, 522. It is his duty to preserve the subject of the tenancy. If, having possession of it, he willfully mismanages it, or tortiously destroys it, he becomes liable to his co-tenants.—*Chesley v. Thompson*, 3 N. H. 1 ; *Anders v. Meredith*, 4 Dev. & Batt. 199 ; *Hyde v. Stone*, 7 Wend. 354 ; *Wilson v. Reed*, *supra* ; 1 Chitty's Pl. (12th Am. ed.) 155. A sale by a tenant in common, of the entire interest, is, so far as he is concerned, equivalent in its legal consequences to a tortious destruction of the subject of the tenancy. It is a violation of the trust and confidence springing from the relation he occupies. It is an attempt to invest himself with the entire interest, in that in which his co-tenants have an interest in common with him. Therefore, though, ordinarily, no action can be maintained *at law* by one tenant in common against another, in such a case the law permits the co-tenant to sue.

The same relation exists when the subject of the tenancy is a remainder, that exists when it is an interest in possession. There is the same community of interest and of duty. There is the same trust and confidence that the one

will do nothing prejudicial to the rights and interests of the other. The violation of that duty and trust is as tortious when the subject of the tenancy is a future, as when it is a present interest; and every reason for maintaining the action applies as forcibly in the one case as the other. True, the same remedies cannot be pursued in each case. When the sale is made during the existence of the particular estate, it is probable that no action at law could be maintained, except a special action on the case; for the reason, that there is not a right of immediate possession. But, that an action on the case will lie, cannot, we think, be denied.—See *Cole v. Robinson*, 1 Iredell, 544; *Ramey v. Green*, 18 Ala. 776; *Nations v. Hawkins*, 11 Ala. 859.

It matters not that the sale would only operate to pass the interest of the tenant making it, not affecting the rights of his co-tenant. The same argument could be made with equal force in the case of a sale of a present interest, or where a stranger sells the property of another. In neither of these cases does the sale divest the title of the true owner; and yet, in each, it would be a good cause of action. There is, indeed, one reason for holding the tenant, making sale of a remainder, liable to his co-tenants, which does not exist in either of the cases just supposed. Such a sale converts the estate in remainder, from an interest in possession, in legal contemplation, for many purposes, into a chose in action.—*Broome v. King*, 10 Ala. 819; *Price v. Tally*, 18 Ala. 21. So far as the liability of the tenant making the sale is concerned, it is not material whether he has possession of the slaves rightfully or tortiously. The ground of his liability is, that he has made sale of an absolute interest, in violation of his duty to his co-tenants, and has unlawfully assumed authority over and disposed of the property of another.

2. The fourth and fifth counts allege the sale to have been made by defendant, but do not aver that he was a co-tenant with the plaintiffs. These counts present the case of a suit by a remainder-man, for an injury by a stranger to the estate in remainder. Such suits have often been main-

tained; the test of their propriety being, whether the injury complained of was permanent in its character, affecting the right of the remainder-man; or temporary, affecting only the interest of the tenant of the particular estate. 1 Chitty's Pl. 62-3; *Beavers v. Trinsmer*, 1 Dutcher, 97; *Trusman v. Railroad Co.*, *ib.* 255; *Mumford v. Railway Co.*, 36 Eng. L. & Eq. 580; *Oxford v. Hallett*, 14 East, 489. A sale of the absolute interest is an injury affecting the rights of the remainder-man. It is designed, and often operates, as a destruction of his interest. If the title of the plaintiffs had been a present, instead of a future interest, the sale would have rendered the person making it without authority liable to the true owner.—*Upchurch v. Norsworthy*, 15 Ala. 765. That it was a future interest, does not change the principle.—See Keyes on Chattels, §§ 532, 374; *Dean v. Whitaker*, 1 C. & P. 347; *Coffey v. Wilkinson*, 1 Metcalf, (Ky.) 101; *Cole v. Robinson*, *supra*.

3. We consider it unnecessary to notice in detail the numerous exceptions founded on the suppression of interrogatories, and the exclusion of evidence. One or two propositions will furnish a sufficient guide for the future conduct of the cause. The rule is, that a man's admissions against his own interest are admissible in evidence against him, and those claiming under him by a title arising after the making of such admissions. The title which the defendant set up was derived through Mrs. Arthur. Consequently, her declarations in disparagement of her own title, made while she was in possession, and before her sale to Diggs, were admissible against the defendant.—*Jennings v. Blocker*, 25 Ala. 415; *Fralick v. Presley*, 29 Ala. 462; *Gillespie v. Burleson*, 28 Ala. 552; *Cole v. Varner*, 31 Ala. 244.

4. We think that the necessary predicate was laid for the introduction of secondary evidence of the contents of the deed of John Singleton. Its execution was shown by the admissions of Mrs. Arthur, under whom the defendant claimed; and its loss was established by her admissions and the other facts testified to by Mrs. Clary. The exist-

ence and loss of the deed being established, the examined copy from the records of the probate court of Clarke county should have been received as evidence of its contents. It was shown that, after the loss of the original, Mrs. Arthur stated that she had obtained from South Carolina a correct copy, and that she had had the same recorded in Clarke county. It was also admitted, that the copy offered in evidence was a copy of the only deed of the sort on record in that county. Upon this state of facts, the court erred in excluding from the jury the copy-deed appended to the deposition of Judge Bettis.—*Fralick v. Presley*, 29 Ala. 457, (462); 2 Phill. Ev. (C. & H.'s Notes, Edwards' ed. 1859,) p. 517, note 446; *ib.* p. 532, note 458; *Corbin v. Jackson*, 14 Wend. 619; *Allen v. Parish*, 3 Hammond, (Ohio,) 111, &c.; *Winn v. Patterson*, 9 Peters, 663, 677.

Judgment reversed, and cause remanded.

WINSTON vs. COX, BRAINARD & CO.

[STATUTORY ACTION FOR PENALTY AGAINST OWNERS OF STEAMBOAT.]

1. *Authority of consignee or warehouse-man to receive goods.*—A consignee of goods shipped by steamboat, is the agent of the owner to receive them at the port of delivery, and has authority to receive them at any particular point at that port; and where the bill of lading stipulates for a delivery "unto warehouse or assigns," at a river landing in the interior, the warehouse-man at that landing is the consignee.
2. *Waiver of statutory penalty against steamboat, for landing goods at improper place.*—If goods shipped by steamboat, on an inland river, are delivered to the consignee or owner, and with his consent, at a point less than ten feet perpendicular above the surface of the water at the specified landing, the owner cannot afterwards maintain an action to recover the statutory penalty (Code, §§ 896-7) on account of such delivery.
3. *Cross-examination of witness.*—In cross-examining a witness for the purpose of testing his credibility, it is permissible to investigate his situation in reference to the subject-matter of the suit, his relations

towards the parties, his interests, prejudices, and motives; and where it appears that his testimony tended to relieve himself of the imputation of negligence in connection with the subject-matter of the suit, and conflicted with the testimony of other witnesses, the appellate court will not reverse on account of the latitude allowed in the cross-examination, unless the record plainly shows that an improper indulgence was permitted.

APPEAL from the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THIS action was brought by Walter C. Winston, against Cox, Brainard & Co., as the owners, and Horace Buckley as the master of the steamboat *Cremona*, to recover the sum of \$4,800, which was alleged to be double the value of certain machinery belonging to the plaintiff, which had been shipped on the defendants' said steamboat, and which they had landed at a point less than ten feet perpendicular above the surface of the water. The only plea was the general issue, and the cause was tried on the issue joined on that plea. It appeared from the evidence adduced on the trial, that the machinery, which consisted of a steam-engine, boiler, and other materials for a steam saw-mill, was shipped by one David, at Mobile, on board of defendants' steamboat, consigned to "warehouse or assigns" at "Tompkins' bluff," a landing on the Tombeckbe river; that the boat reached the landing in the middle of the night, and put off the machinery at a point less than ten feet above the surface of the water; that it was raining at the time, and the river was rising; that the machinery was partly submerged by morning, remained under the water for nearly a month, and was thereby greatly injured. "The defendants offered evidence to prove, that one F. M. Hill, who was the warehouse-man at the landing, came down to the boat about five minutes after she landed, told the officers of the boat that they might put said freight out where it was placed, and expressed himself satisfied after it had been put out."

The deposition of Hill was taken by the plaintiff, and cross-interrogatories were filed on the part of the defend-

ants. Before the trial commenced, the plaintiff moved to suppress the answers of the witness to the cross-interrogatories numbered from four to fifteen inclusive, on the ground of irrelevancy and illegality; but the court overruled the motions, and the plaintiff excepted. The substance of these answers is stated in the opinion of the court, and it is therefore unnecessary to copy them here.

"The court charged the jury, that under the bill of lading, which it was the duty of the court to construe, a delivery to the warehouse-man at the landing was a delivery to the warehouse; that the warehouse-man was the agent of the owner; and that if he received the freight, although it was not placed ten feet perpendicular above the surface of the water, this act would be binding on the plaintiff, and he could not recover."

The plaintiff requested the court to charge the jury—

"1. That if they believed, from the evidence, that the defendants were the owners of the *Cremona* at the time plaintiff's machinery was shipped, to be transported and delivered at Tompkins' bluff; and that the officers of said boat had the machinery landed at said bluff, but did not have it placed ten feet perpendicular above the surface of the water; and that the river was not at that time too high to admit of the machinery being so landed,—then the plaintiff has a right to recover in this action, and would be entitled to recover double the value of the machinery.

"2. That the warehouse-man was the general agent to receive freight, if landed according to the requirements of the law; but that such general agency did not authorize him to consent to receive freight, so as to discharge the owners of the boat from liability, without express authority from the owner of the freight, unless it was landed ten feet perpendicular above the surface of the water; and if he had any such authority, it devolves on the defendants to show it; and if they have failed to make such proof, they are liable.

"3. That if the defendants were the owners of the *Cremona* at the time plaintiff's machinery was shipped on—

board thereof, to be transported and delivered at Tompkins' bluff, and the officers of said boat had said machinery landed at said bluff, but did not place it ten feet perpendicular above the surface of the water, and the river was not too high at the time to admit of its being so landed,—then the plaintiff has a right to recover in this action, unless the jury should be satisfied, from the evidence, that the machinery was received by the warehouse-man, and that he was authorized by the owner to receive it, at the point where it was landed; that this would involve the further inquiry, whether the warehouse-man was the agent of the owner, and the extent of his agency; that he was the general agent, and had the right to receive freight when delivered according to the requirements of the law; but that, if said freight was not landed ten feet above the surface of the water, and the warehouse-man did so receive it, then, unless he had special authority from the owner so to receive it, the defendants would be liable; that it is for the defendants to show that he had such special authority, and, if they have failed to show it, they are liable for double the value of the machinery.

“4. That the law requires freight to be landed ten feet perpendicular above the surface of the water; that unless this has been done, the defendants are liable, unless the owner, by himself or his authorized agent, waived this right; that it is for the defendants to prove this fact; that the warehouse-man, under his general agency, would have no right to receive freight not landed ten feet perpendicular above the water, without special authority from the owner, and this should be proved by the defendants.”

The court refused each of these charges as asked, but gave the first with the qualification, “that if the machinery was received by the warehouse-man at less than ten feet above the water, and he was satisfied, and accepted such delivery, the defendants would not be liable;” and also gave the second and third charges, each, with the qualification, “that the warehouse-man had authority, under the bill of lading, to receive the machinery at less than ten

feet above the surface of the water;" to which qualifications, as also to the refusal of the charges as asked, and to the affirmative charge given by the court, the plaintiff reserved exceptions.

The rulings of the court on the evidence, the charge given, and the refusal of the several charges asked, are now assigned as error.

WM. BOYLES, for appellant.

GEO. N. STEWART, *contra*.

A. J. WALKER, C. J.—Section 896 of the Code requires masters of steamboats and other water-craft to land goods, at the landing for which they are shipped, at least ten feet perpendicular above the water, unless the river is too high to admit of it. The next section prescribes a penalty of double the value of the goods for the failure to place them as required. The main question of this case is, whether the prescribed penalty is avoided, by a delivery at the proper landing to the consignee, and with his consent, at a point on the bank less than ten feet perpendicular above the water.

The consignee, not being an owner, is the agent of the owner to receive the property which is the subject of the consignment, at the port of delivery; and it is the duty of the carrier to deliver to the consignee.—Angell on Carriers, §§ 323, 313, 282, 287, 300, 305, 316; *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209; *Conrad v. Atlantic Ins. Co.*, 1 Peters, 386, 447.

But it is said, that the law requires a delivery ten feet perpendicular above the water; that the law must be regarded as incorporated into the contract; and that, therefore, the contract must be construed as if it contained an express stipulation for delivery to the consignee ten feet above the water. A concession of that argument does not affect the question. It does not follow that the consignee is only authorized to receive at a point ten feet above the water, because a legal obligation is on the carrier to deliver

at that point. The statute aims to protect the interests of shippers, by imposing a specified duty upon carriers, to be performed for the benefit of such shippers. There is nothing in the purpose and spirit of the law, indicating a design to restrict the authority of a consignee at the port of delivery; and certainly no such design could be inferred from the letter of the law.

If the carrier had entered into an express contract to deliver to the consignee at his dwelling-house, it would scarcely be contended, that a delivery, at the request of the consignee, could not be made at his warehouse. The consignee, having authority to receive at the port of delivery and discharge the carrier, may absolve him from the obligation to deliver at any particular point at the port of delivery, and accept at some other point at that port. He is invested with the authority so to do by the relation in which he stands to the consignor. It is conceivable that, in many instances, neither the interest of the consignor, nor the convenience of the consignee, would be promoted by requiring a delivery, against the wishes of the consignee, ten feet above the water. The general rule, sometimes modified by local usages, is, that the carrier is bound to deliver personally to the consignee at the place of delivery; and this rule is subject to the qualification, that in cases of carriers by ships and boats, and perhaps by railroad, notice given to the consignee of the arrival and place of deposit comes in lieu of delivery.—*Fisk v. Newton*, 1 Denio, 45; Angell on Carriers, § 313. The great duty of the carrier is safe delivery to the consignee, at the proper port; and it would be strange if, after such delivery is accomplished, the carrier should remain liable.

The consignee, who is, for most purposes, deemed the owner, may waive a full compliance with all the terms of the carrier's contract in reference to delivery; and his acceptance of the goods is such a waiver.—Story on Bailments, § 541; Story on Agency, § 111; *Lewis v. Western Railroad Co.*, 11 Metc. 509; 2 Kent's Com. m. p. 605.

The bill of lading contains the stipulation to deliver

"unto warehouse, or to assigns, he or they paying freight." The warehouse-man at that landing was, under this contract, the consignee.

[2.] A party can not recover a forfeiture allowed him by law, when it was incurred by his consent, and in consequence of his act. He can not take advantage of the non-performance of an act, required by law to be performed for his benefit, when its performance has been waived by him, or his authorized agent.—*Dunlap v. Clements*, 18 Ala. 778; *Vastbinder v. Spinks*, 10 Ala. 386. If, therefore, the goods in this case were delivered to the consignee, at the proper landing, with the consent of such consignee, less than ten feet perpendicular above the surface of the river, no cause of action in favor of the plaintiff arose.

The necessary conclusion from the principles above stated is, that there was no reversible error in the giving and refusing to give instructions to the jury as stated in the bill of exceptions.

[3.] Assignments of error are made upon the admission of the answers of Hill to the defendants' cross-interrogatories numbered from four to fifteen inclusive. The bill of exceptions discloses, that the testimony of this witness was at variance with that of other witnesses upon material points. It was, therefore, important for the defendants, by cross-examination, to test the credibility of the witness. When a cross-examination is employed for this purpose, the rule which restricts the admission of evidence to relevant facts, is not usually applied with the same strictness as in examinations in chief.—1 Greenleaf on Ev. § 449. In such cross-examination, a party may investigate "the situation of the witness with respect to the parties, and to the subject of litigation; his interest, his motives, his inclination, and prejudices; his means of obtaining a correct and certain knowledge of the facts to which he bears testimony; the manner in which he has used those means; his powers of discernment, memory, and description."—1 Greenl. on Ev. § 446; *Seale v. Chambliss*, 35 Ala. 19; *Stoudenmeier v. Williamson*, 29 Ala. 558. This court will not reverse on account

of latitude allowed in such a cross-examination, unless it is plain that an improper indulgence was allowed. We are not prepared to say, that the cross-examination as to the whole of the answer to any one cross-interrogatory was plainly carried to an undue extent in this case; and we, therefore, will not reverse on account of it. The exceptions did not raise any question as to the admissibility of any distinct parts of any answer. We cannot affirm that it was improper for the court to allow the defendant to show that the witness was the warehouse-man; that he received the goods from the boat, and took the bill of lading; together with all facts bearing upon the question, whether he himself had not been guilty of negligence, from the consequences of which a recovery by the plaintiff in this case would contribute to relieve him, and from the imputation of which he would naturally desire to guard. The testimony as to the length of time which expired before the goods were all removed from the place where they were put by the defendant; as to their being carried away by the owner, and found defective; as to a part of them having been under water; as to the presence of boats, and other appliances, which might have been serviceable in removing the goods before the water arose over them; as to his customary mode of receiving goods, and as to his being present in person, and thus having an opportunity to observe the condition of things,—were all matters which related to the question of his own negligence in discharging the duties of his agency for the plaintiff. The answer to the 6th cross-interrogatory was relevant to the material point of the plaintiff's ownership. The answer to the 13th related to the question of the payment of freight, and was relevant, because from the payment of freight acceptance of the goods might have been argued, and the acceptance by the consignee was an important point in the case. We think there was no reversible error in the admission of the testimony objected to.

Affirmed.

GARNER vs. BRIDGES.

[TRESPASS FOR LEVY OF ATTACHMENT ON SLAVE]

1. *Competency of vendor as witness for purchaser.*—The vendor of a slave is a competent witness for the purchaser, in a suit involving the title, where it appears that his interest is equally balanced: section 2302 of the Code does not apply to such a case.
2. *Relevancy of evidence to disprove fraud.*—Where an attachment is levied on a slave, and a purchaser from the defendant in attachment brings trespass against the plaintiff, and the validity of the sale is impeached, the plaintiff may show, in rebuttal of the evidence of fraud, that by the statute laws of Mississippi, where the vendor resided at the time of the sale, one slave was exempt from levy and sale under legal process against the head of a family.
3. *Admissibility of vendor's declarations as evidence against purchaser.*—The declarations of the vendor of a slave, made several months before the sale, not explanatory of his possession or title, and not made in the presence of the purchaser, are not competent evidence against the purchaser.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by John Bridges, against John H Garner, to recover damages for an alleged trespass, which consisted in causing the levy of an attachment against one John L. Bridges, who was a son of the plaintiff, to be made on a slave which the plaintiff claimed under a purchase from said John L. Bridges prior to the levy of the attachment. The defendant pleaded the general issue, "in short by consent, with leave to give any special matter in evidence;" and issue was joined on that plea. The plaintiff's bill of sale for the slave was dated the 11th April, 1859, and contained a warranty of title. The defendant sought to impeach the validity of the purchase by the plaintiff, on the ground of fraud; and, for that purpose, adduced evidence showing that John L. Bridges resided in Mississippi, and was largely indebted, if

not insolvent; and that the slave was sent to Mobile for sale, within five or six days after the plaintiff's purchase, and was there seized under the defendant's attachment. It was shown, also, that John L. Bridges was the head of a family; and the plaintiff was allowed to read in evidence, against the defendant's objection, the statute of Mississippi which exempts one slave from sale under legal process against the head of a family; to which ruling of the court the defendant reserved an exception. The defendant took the depositions of one P. M. Gaddis, from whom John L. Bridges bought the slave, and of one Henry Collier, who was present at the sale; each of whom testified to declarations made by said John L. Bridges after his purchase, and while he had possession of the slave, to the effect that he intended to exchange the boy for a negro woman for the use of his family. The court suppressed these declarations, on the plaintiff's objection, on the ground that they were not competent evidence against him; to which ruling, also, the defendant excepted. The deposition of John L. Bridges was taken by the plaintiff, for the purpose of proving his purchase of the slave, and the execution of the bill of sale to him. The defendant objected to the competency of the witness, on the ground of interest, and reserved an exception to the overruling of his objection.

The several rulings of the court on the evidence, to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

JNO. L. SMITH, for appellant.

JNO. T. TAYLOR, *contra*.

R. W. WALKER, J.—As the vendor was examined as a witness for his vendee, it is plain that he must have known of the existence of the suit. But it is not shown that he was formally and seasonably informed by the vendee of the pendency of the suit, and required to defend it. To say the least, it admits of question, whether the ven-

dor's mere knowledge of the existence of the suit will suffice to make the judgment evidence against him, in favor of his vendee, of the facts on which it is founded.—3 Phill. Ev. (C. & H.'s Notes, 2d ed.) 816–17, 982–4; 1 Greenl. Ev. §§ 394, 397, (note 2,) 404; 2 Smith's Leading Cases, 684. However that may be, it is certain that, unless rendered otherwise by statute, the vendor in this case is a competent witness for his vendee, because his interest is equally balanced.—*Zackowski v. Jones*, 20 Ala. 189; *Holman v. Arnett*, 4 Porter, 63; 2 Phill. Ev. (C. & H.'s Notes, 2d ed.) 120–2, 126–9; 3 *ib.* 1543–4; 1 Greenl. Ev. §§ 420, 398, note (3.) It is equally certain, that the Code has not made him incompetent. Section 2302 was not designed to increase, but to diminish the number of incompetent witnesses. It simply destroys the common-law objection on the ground of interest, except in cases where the verdict and judgment would be evidence for the witness in another suit. The witness, to be incompetent, must still be interested; and he is not interested, in the legal sense of that term, even though the verdict and judgment would be evidence for him in another suit, if he is equally interested on both sides of the cause.—See *Rupert v. Elston*, 35 Ala. 86.

2. The law of Mississippi was admissible in evidence, for the purpose of repelling the idea of fraud in the sale.

3. The declarations of John L. Bridges were properly excluded. They were made three months before the sale to the plaintiff, when the latter was not present, and were not explanatory of the vendor's possession or title.

Judgment affirmed.

LAWSON *vs.* HICKS.

[ACTION FOR DEFAMATION.]

1. *When action lies for words used in judicial proceeding.*—Words; spoken or written, in the course of a judicial proceeding, by the court, the parties, or the counsel, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that they were relevant, and had reasonable or probable cause so to believe; nor in any case, without proof of actual malice.
2. *Averment of want of probable cause.*—An averment that the alleged defamatory words were irrelevant, and were used “without justifiable cause or excuse,” is not equivalent to an allegation of the want of probable or reasonable cause.
3. *What is available defense under general issue.*—Where the alleged defamatory words were contained in cross-interrogatories propounded to a witness in a former suit between the parties, it is a good defense under the general issue, that the defendant propounded the interrogatories for the purpose of laying a predicate to impeach the witness, and honestly believed that he had the right so to do.
4. *Error without injury in sustaining demurrer to special plea.*—The sustaining of a demurrer to a good special plea, when the defendant had the benefit of the same defense under the general issue, is error without injury.
5. *Proof of relevancy.*—The mere fact that a deposition, taken on interrogatories and cross-interrogatories, was read in evidence on the trial, does not justify the conclusion, as matter of law, that the cross-interrogatories called for relevant matter.
6. *Proof of publication.*—The fact that the cross-interrogatories to a witness, which contained the alleged defamatory words, signed by the defendant, and in his handwriting, were found in the clerk’s office, tends to show a publication by him, and may go to the jury as evidence of publication.
7. *Relevancy of evidence to impeach witness, and disprove declaration of party.*—Where a witness testifies to a declaration made by a party in conversation with him, the party cannot be allowed, for the purpose of impeaching the witness, and rebutting his testimony, to prove by another witness, who had known him intimately for a number of years, that he had never made any such declaration to him.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. NAT. COOK.

THIS action was brought by Henry H. Hicks, against John R. Lawson, to recover damages for defamatory words

written and published by the defendant, of and concerning the plaintiff, in filing cross-interrogatories to one Lamb, whose deposition was taken by the plaintiff in a former action of trespass instituted by him against the defendant. All the alleged defamatory words were contained in the sixth cross-interrogatory, which was as follows: "*If, in answer to the direct interrogatories, you should state that you heard defendant say anything about hogs, or upon the subject of Hicks, state fully, and whether defendant said anything about the hog that Hicks was found in possession of, belonging to the defendant, and, when he was caught with the hog, pretended that he had bought the hog of Thomas Hazard; but that Hazard, unlike the negro for the sake of the credibility (?) of his young mistress, refused to take it upon himself. If any thing on the subject of Hicks, state whether defendant said any thing about the cotton that Cary said Hicks stole, or about the charge of theft by Cook against Hicks; anything about the money belonging to Dr. Battle, which Hicks tried to hold in his weasel, under the pretense that it was burned in his house by the Indians; but that Dr. Battle, never dreaming that Hicks was so indifferent about money as to leave it purposely in his house to be burned by the Indians, made Hicks fork it over; anything about Hicks being shot at by the Indians about the same time, and the ball passing so close to his mouth that it knocked out two of his front teeth, and that he placed them back with his fingers, and they grew fast again; anything about Hicks having worn some of Allen Ashburn's old clothes, (an old deceased character, having ———, or something worse,) having taken the clothes for Ashburn's board, and having subsequently sworn upon the stand, in the town of Tuskegee, in one of the courts of justice, that he never charged anything for board, but that Ashburn and Cox had complimented him with a little something. (Wonder if that 'little something' was old clothes?) Anything about Hicks having attempted to assassinate defendant, at defendant's own house, in the night-time, by trying to shoot defendant through the window while he was lying on his bed; anything about the Evans' having said that Hicks, about the time of his early set-*

tlement in Macon county, murdered one of his negroes, after taking him out of jail, before he got him home ; anything about the Indians that Hicks boasted of having charged his horse on, and sinking him in a mud-hole ; anything about what some of Hicks' neighbors say about the miraculous disappearance of a little boy that was living with Hicks, by the name of Fair, after some difficulty between the lad and Hicks, and that nothing had ever since been seen or heard of the lad, except that some persons found his hat in Conecuh swamp ; anything about Hicks mounting the gate-post, and crowing every time he heard one of Parson Moulton's Shanghai chickens crow ; anything about Blackman having said, that Hicks told him, on the way from Tuskegee, that he would whip defendant, if he had not a wife, before he left town that day. Keep the peace, and declare fully."

The amended complaint was in the following words : "Plaintiff claims of defendant the sum of twenty thousand dollars, as damages for falsely and maliciously publishing of and concerning him, the said plaintiff, in some cross-interrogatories filed by said defendant, in his own hand-writing, in a case pending in the circuit court of Macon county, in which the said plaintiff in this suit was plaintiff, and the said defendant was defendant, to one J. K. Lamb, a witness to whom interrogatories had been filed by the said plaintiff, among other false matters, the following false, scandalous, and defamatory matter, with the intent to defame the said plaintiff ; that is to say, the said defendant, in crossing the said interrogatories to the said witness Lamb, did falsely, maliciously, and with the intent to defame the said plaintiff, write and publish to the said witness, J. K. Lamb, among other matter, the false, scandalous, malicious, and defamatory words following," &c., setting out the italicized portions of the interrogatory above copied. "And the said plaintiff avers, that by asking the said questions of the said witness, and by writing down and publishing the same, the said defendant meant and intended falsely and maliciously to charge the said plaintiff with the several crimes therein named or indicated, and to hold plaintiff up

to scandal and disgrace, and was so understood ; and the said plaintiff further avers, that said matters above alleged are false and defamatory, and were wholly irrelevant and improper, impertinent and immaterial to the issue joined between the parties to said suit, and were improper, false, and malicious, and were inserted, written, and put in said cross-interrogatories without justifiable cause or excuse, and with the intent on the part of said defendant to defame the said plaintiff."

The defendant demurred to the amended complaint, and assigned as grounds of demurrer "all the causes of demurrer which could be specifically assigned thereto, and to each count thereof." The court overruled the demurrer, and held the complaint sufficient ; and the defendant then filed the following special pleas :

"1. *Actio non*, because he says that the said several matters stated and set forth in the several counts in said complaint, are parts of one and the same paper writing, and none other ; and that the said paper writing consisted of cross-interrogatories propounded to one J. K. Lamb, as a witness, in a cause then pending in the circuit court of Macon county, between the said Henry H. Hicks as plaintiff, and this defendant as defendant ; to which said witness the plaintiff had propounded interrogatories in chief, and filed the same in said circuit court, according to the regular practice of said court, to take the deposition of said witness, to be used as evidence in said cause then pending in said court, (of which cause said court had full and ample jurisdiction,) and caused notice of the filing of said interrogatories to be served on this defendant, who appeared in person in said cause, and defended himself ; and that this defendant, in the regular course of practice in said court, as a means of testing the memory of said witness, and as a predicate for laying a foundation to impeach him, and for the further purpose of disproving malice on the part of this defendant, by proof of his making no allusion to the various reports and circumstances inquired about in the said several cross-interrogatories, and honestly and in good faith

believing that he had the right to file and exhibit said cross-interrogatories, propounded said cross-interrogatories to said witness, and filed the same with the papers of said cause, to accompany the interrogatories in chief, with the commission, to take the deposition of said witness; which said cross-interrogatories did accompany said interrogatories in chief and said commission, and were propounded to the said witness; and the same, with the answers thereto of said witness, as well as the answers to the interrogatories in chief, were returned to said circuit court by the commissioner in said commission named, and the same were read and used as evidence on the trial of said cause, in the regular course of the legal proceedings; and this defendant avers, that he did not otherwise, in any manner whatever, utter or publish the supposed matter stated in said several counts to be libellous; and this he is ready to verify," &c.

"2. *Actio non*, because he says that the said several matters stated and set forth in plaintiff's said complaint as libellous, are parts of one entire paper writing, being cross-interrogatories propounded to one J. K. Lamb, a witness examined by the said plaintiff in a cause then pending in said circuit court of Macon county, wherein said plaintiff was plaintiff, and this defendant was defendant, and of which cause said court had full and legal jurisdiction; which paper writing was filed in said cause, and comprised a part of the regular proceedings in said cause, and was filed in the regular course of practice and judicial proceedings in said cause, and the same was not otherwise composed or published by this defendant in any manner whatever; and this defendant avers, that the deposition of said witness, taken in answer to said interrogatories and cross-interrogatories, was read and used on the trial of said cause, and formed a part of the regular judicial proceedings in said cause; and this he is ready to verify," &c.

"3. *Actio non*, because he says, that the said several matters set forth in plaintiff's complaint as libellous, grew out of, and formed a part of a regular judicial proceeding, in a

certain cause then pending in said circuit court of Macon county, wherein said Hicks was plaintiff, and this defendant was defendant; and the said matters in said several counts charged as libellous, were not otherwise composed or published; and this the said defendant is ready to verify," &c.

The court sustained a demurrer to each of these pleas, and issue was then joined on the plea of not guilty. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the record of the suit in which Lamb's deposition was taken, "and proved, that he filed direct interrogatories to said Lamb, as a witness for him in said cause, and served them on the defendant; and that a short time thereafter, in March, 1856, a set of cross-interrogatories to said witness was found in the office of the circuit clerk, with the name of the defendant signed to them; but there was no other evidence that the defendant placed them there, or that the cross-interrogatories, or the name signed to them, was in the handwriting of the defendant; and the only evidence of the publication of said cross-interrogatories was as above set forth." The defendant objected to the reading of the cross-interrogatories as evidence; but the court overruled his objection, and allowed them to be read to the jury; to which the defendant reserved an exception. In the further progress of the trial, the defendant introduced one Ramsey as a witness, "who testified, that in the latter part of 1854, while he and Hicks were trading in horses, Hicks told him that he and others had shot at Lawson's house at night. To rebut this evidence, and to impeach the credit of said Ramsey, plaintiff offered to prove, by a witness named Thompson, that they had been intimate with each other for fifteen years, and that plaintiff had never told him that he had shot at Lawson's house." The court admitted this evidence, against the defendant's objection, and the defendant excepted.

The rulings of the court on the pleadings and evidence, as above stated, with other matters, are now assigned as error.

W. P. CHILTON, and S. F. RICE, for appellant.

GUNN & STRANGE, *contra*.

A. J. WALKER, C. J.—Words, calumnious in their nature, may be deprived of their actionable quality by the occasion of their utterance or publication. When this is the case, they are called in the law of defamation privileged communications. These communications are either absolutely or conditionally privileged. When they are absolutely privileged, the law affords conclusive and indisputable immunity from suit. When they are conditionally privileged, the law simply withdraws the legal inference of malice, and gives a protection upon the condition, that actual malice, or express malice, or malice in fact, (as the same idea is variously phrased,) is not shown. The distinction between the two classes is, that the protection of the former class is not at all dependent upon their *bona fides*; while the latter is merely freed from the legal imputation of malice, and become actionable only by virtue of the existence of express malice.—Cooke on Defamation, 28, 31, 60; Starkie on Slander, 229, 292. This latter class comprehends all those cases, “where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform.”—Starkie on Slander, 292; Cooke on Defamation, 31; *Toogood v. Spyring*, 1 Cr., M. & Ros. 181; *Easly v. Moss*, 9 Ala. 266; *Stallings v. Newman*, 26 Ala. 266.

To the catalogue of absolutely privileged communications belong all words spoken or written by the court, the parties, or the counsel, in the due course of judicial proceedings, *which may be relevant*. The *relevancy*, or *pertinency*, of the calumnious matter is indispensable to its perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated. Some obscure expressions may

be found in the English Reports, from which ingenuity might extort an argument, that communications in the course of judicial proceedings were absolutely privileged, so far as a subsequent action might be concerned, without regard to their pertinency. As an example of such expressions, we may instance the following remark of Lord Mansfield: "There can be no scandal, if the allegation is material; and if it is not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon record."—*Astley v. Young*, 2 Burr. 807. See, also, the remarks of Chancellor Walworth upon several cases, in *Hastings v. Lusk*, 22 Wend. 410. We apprehend, that the remark quoted, if defensible at all in its full extent, was intended merely to suggest a large authority in the court before which the scandal was committed, and not to deny that irrelevant words, uttered with actual malice, might become the basis of a subsequent action.

The law designs, in the adoption of the principle above stated, to relieve those participating in the proceedings of courts of justice from the restraint which might result from the apprehension of lawsuits. The accomplishment of that object does not require that the privilege of absolute exemption should be extended farther than to relevant communications. A further extension would license malignity to pervert judicial proceedings to the accomplishment of its wicked purposes. The avoidance of such a consequence is scarcely less important than the guarding of the unembarrassed freedom of judicial investigation. Accordingly, we find numerous and conclusive authorities, which, in the clearest manner, put the qualification, that only those communications, occurring in the course of judicial proceedings, are absolutely privileged, which are relevant.—*Brook v. Montague*, 2 Cro. Jac. 90; *Hodgson v. Scarlet*, 1 B. & Al. 232; *Flint v. Pike*, 4 B. & C. 473, 481; *Mower v. Watson*, 11 Verm. 536; *Suydam v. Moffat*, 1 Sandf. (S. C.) R. 459; *Warner v. Paine*, 2 Sandf. 3. C. 195; *Lea v. White*, 4 Sneed, 111; *Ring v. Wheeler*;

7 Cow. 725; *Gilbert v. People*, 1 Denio, 41; *Garr v. Selden*, 4 Coms. 91; *Fairman v. Ives*, 5 B. & Ald. 642.

If the communications be irrelevant, they do not necessarily become actionable. They must be malicious, as well as irrelevant. Because they were uttered in the course of judicial proceedings, the law does not draw the inference of malice from their injurious character, but requires from the complaining party proof of actual malice. The line which separates relevancy from irrelevancy to a legal controversy, is often extremely shadowy and indistinct; and the position of the counsel or parties, conducting a cause, would be full of peril, if the imputation of legal malice was incurred whenever, from ignorance of law, or frailty of judgment, criminatory remarks of an irrelevant character might be made. The communications of counsel and parties, made in the due course of a judicial proceeding, are, therefore, not only absolutely privileged when relevant, but can not constitute a cause of action, although irrelevant, unless they are in fact malicious.

Malice is usually inferred by law from the defamatory matter itself; and, when so inferred, it is denominated legal malice, in contra-distinction to malice in fact. Where this legal inference of malice is drawn, the absence of express malice is no justification, although it is to be considered in mitigation.—Cooke on Defamation, 28; Starkie on Slander, 213, 216, 456, m. p. 217, 218; *Shelton v. Simmons*, 12 Ala. 466; *Curtis v. Massey*, 6 Gray, 272. The inference of malice is not drawn as a matter of law, when the words are spoken or written, by parties or counsel, in the due course of judicial proceedings, although they may be irrelevant; and the plaintiff is compelled to base his recovery upon the existence of malice in fact. The question of malice becomes purely an inquiry for the jury; and they may consider the character and quality of the words, in determining the question of malice. The intrinsic effect of the words would argue to the jury the existence of express malice, with a force which would be increased by the obviousness of their irrelevancy, and the grossness of the

calumny, and might be lessened or destroyed by the ignorance of the defendant, or other pertinent circumstances. The entire question of malice is an inquiry of fact, to be determined by the jury, upon all the evidence pertinent, in the light of their reason; and they must give to the intrinsic force of the words themselves such weight upon the point at issue as it may seem to them to merit, when considered in connection with the other evidence.

For the purpose of supporting and illustrating our views, as to the principles which must govern when irrelevant expressions are used in the course of judicial proceedings, we proceed to note the positions of some legal authorities upon the subject. The words "relevancy or pertinency," in this class of cases, seem to be sometimes used by English authors indiscriminately with the phrase "probable or reasonable cause"; and Cooke, in his most excellent work on Defamation, (page 60,) says: "The pertinency of the matter to the occasion is, it is submitted, that which is meant by probable cause." Starkie, in his work on Slander, (p. 286,) doubts whether a recovery can be had against an advocate, for words spoken by him in a judicial controversy, and concludes that, at all events, such recovery can only be had in a special action, alleging express malice and the want of probable cause.—See, also, Cooke on Def. 62; 1 Amer. Leading Cases, 185; *Fairman v. Ives*, 5 B. & Al. 642; *Hodgson v. Scarlet*, 1 ib. 232. Holroyd, J., announcing his opinion in the case of *Flint v. Pike*, (4 B. & Cr. 481,) says: "And if a counsel, in the course of a cause, utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not therefore be responsible to the party injured, in a common action for slander, but that it would be necessary to sue him in a special action on the case; in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously, and without reasonable cause." The learned judge furthermore assimilates such an action to a suit for malicious prosecution, in which it is necessary to aver want of probable cause and malice.—*Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, 19 Ala. 605.

In the case of *Mower v. Watson*, (11 Verm. 536,) the court thus sums its conclusions on this subject from an elaborate examination of the authorities. "If any one considers himself aggrieved, in order to sustain an action of slander, he must first show that the words spoken were not pertinent to the matter then in progress, and that they were spoken *maliciously* and *with a view to defame him*." There are several decisions in the New York Reports to the same effect. Contenting ourselves with referring to the rest, we extract from *Suydam v. Moffatt*, (1 Sandf. S. C. R. 459,) the following statement of the law in reference to irrelevant matter published in a judicial proceeding: "Though the words in the declaration were not published on an occasion which forms an effectual shield to the defendant, whatever his motives may have been in using them; yet, in cases of this kind, the law does not impute malice to a party, from the mere fact of his having published the words. The jury must be satisfied that there was actual malice on the part of the defendant, and that they were published for the mere purpose of defaming the plaintiff."—*Warner v. Paine*, 2 Sandf. S. C. R. 195; *Garr v. Selden*, 4 Coms. 91; *Ring v. Wheeler*, 7 Cow. 725; *Gilbert v. People*, 1 Denio, 41; *Hastings v. Lusk*, *supra*; also, *Lea v. White*, 4 Sneed, 111.

We think it is also a correct proposition in law, that a party or his representative is not amenable to an action, where, although the matter stated was impertinent, he believed that it was relevant, and had reasonable or probable cause so to believe. Cooke, in his work on Defamation, (p. 62,) to which we have heretofore referred, says: "It seems that the parties, or their representatives, are entitled to state anything, which, although not strictly relevant, may be fairly supposed by them to weigh with the court." In the case of *Lea v. White*, (*supra*,) the matter alleged to be libellous consisted of a return to a writ of *habeas corpus*; and the court thus states the question, upon which the case turned, and the decision of the question: "Could the defendant have reasonably supposed it necessary to his de-

fense to return on the writ of *habeas corpus* the alleged libellous matter? We think that he might have reasonably supposed that the statement would have exerted an influence on the mind of the court; and this being so, he had a right to introduce it, and rely upon it in his defense." In *Hastings v. Lusk* and *Suydam v. Moffat*, (*supra*,) the position is distinctly taken, that if the defendant honestly supposed the declarations to have been relevant to the proceeding, he is shielded from action. Chief-Justice Tilghman expressed the same idea, by saying that, "if a man should abuse his privilege, and *designedly wander* from the point in question, and maliciously heap slander upon his adversary, he would not say that he was not responsible in an action at law."—*McMillan v. Birch*, 1 Bin. 178; *Ring v. Wheeler*, *supra*.

Lest the generality of the expressions quoted should mislead, we close our observations upon this point by remarking, that the defendant is not absolutely shielded by the single fact of his believing the matter to be relevant; but, to entitle him to be thus shielded, there must be also reasonable or probable cause for so believing. In the absence of reasonable or probable cause, his belief of the relevancy would be a matter of fact to be weighed by the jury in determining the question of malice. The grossness or obviousness of the irrelevancy is a matter to be weighed by the jury, in determining the question of reasonable or probable cause, in like manner as in determining the question of malice. We deem it proper further to distinctly announce, as another result of our investigations, that words spoken in the course of judicial proceedings, although irrelevant, are not actionable, unless it affirmatively appears that they were malicious, and without reasonable or probable cause.

[2.] Guided by the principles which we have stated, we decide, that the plaintiff's amended complaint would be good, and that the demurrer to it would be properly overruled, if it contained the averment of a want of reasonable or probable cause. It avers the want of "*justifiable cause*

or excuse." This averment is not equivalent to that which the law requires.

[3-4.] The defendant's first special plea was also a valid defense to the action; but we would not reverse for the error of sustaining a demurrer to it, as the defense it sets forth was available under the general issue.—*Hastings v. Lusk, supra*; *Suydam v. Moffat, supra*; 1 Saunders on Pl. & Ev. 801; Starkie on Slander, 455; Cooke on Def. 107.

[5.] The defendant's second special plea was bad. It proceeds upon the erroneous supposition, that the mere reading of cross-interrogatories and the answers to them in evidence is proof, in a subsequent cause between the same parties, that they were relevant. Whatever might be the effect of a decision that they were relevant, a legal conclusion of relevancy cannot be drawn from the mere fact of reading in evidence.

The third special plea was bad, as is apparent from a comparison of it with the principles hereinbefore laid down.

[6.] The fact that the cross-interrogatories, signed by the defendant, and in his handwriting, were found in the clerk's office, was evidence so conducing to show a publication, that the court might with propriety admit them in evidence, and leave the question of publication to the jury.

[7.] The defendant having proved by a witness a declaration of the plaintiff, to rebut this evidence, and to impeach the defendant's witness, the plaintiff was permitted to prove, by another witness, that he had been intimate with the plaintiff for fifteen years, and had never been told any such thing by him. In admitting this evidence, the court erred. It has been decided in this State that, "when the situation of a witness is such that, if a fact had existed, he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist." *Blakey v. Blakey*, 33 Ala. 611. The reason of this principle does not sustain the ruling of the court below, in permitting a witness to state, in general terms, that he had not at any time heard the party utter a declaration proved by another witness. The general rule, to which the point

presented is no exception, is, that a party cannot make evidence for himself, either by his conduct or declarations. *Chaney v. State*, 31 Ala. 342; *Bradford v. Edwards*, 32 Ala. 628.

As the judgment of the court below must be reversed for reasons already stated, and the principles we have laid down cover the real and important questions of the case, we decline to further swell this opinion.

Reversed and remanded.

BARRON, MEADE & CO. vs. PAULLING.

[BILL IN EQUITY BY ASSIGNEE FOR REDEMPTION.]

1. *Rents and profits.*—In taking an account of the mortgage debt, between the mortgagees and an assignee of the equity of redemption, the former are chargeable only with the amount of rents actually received by them, unless they have been guilty of fraud or willful neglect; and where rents are received by one of the mortgagees individually, under a judgment in his favor against the assignee, the amount so received by him must be credited on the mortgage debt, unless it is shown to have been received by him by virtue of a right independent of the mortgage.
2. *Conclusiveness of judgment.*—A judgment in an action of trespass to try titles, which recites that the defendant has voluntarily abandoned the possession of the land, with all claim of title thereto; that the plaintiff has taken possession; and that thereupon came a jury, who assessed the plaintiff's damages; and by which it is considered by the court, that the plaintiff recover of the defendant the damages so assessed,—does not preclude the defendant, in a subsequent chancery suit to redeem the land, instituted by him as an assignee of the equity of redemption, from insisting that the recovery was based on a mortgage to a partnership, of which the plaintiff was a member, and that the mortgagees are therefore chargeable with the amount received by the plaintiff under the judgment.
3. *Costs at law, and attorney's fees.*—The mortgagees are not chargeable with the amount of costs incurred and paid by the assignee in an unsuccessful attempt to defend the possession at law, or to resist the collection of rents and profits; nor can they charge the assignee with their own attorney's fees.
4. *Statutory penalties accountable for as rents and profits.*—The mortgagees

- having recovered a judgment against the assignee of the equity of redemption, in a statutory action of debt, for cutting timber on the mortgaged lands, the assignee is entitled to have the amount paid by him under the judgment credited on the mortgage debt, and to have the judgment perpetually enjoined on discharging the mortgage debt.
5. *Conclusiveness of judgment by consent.*—Where the plaintiff consents of record, on motion for a new trial by the defendant, that the verdict may be reduced to a specified sum, for which a judgment is thereupon rendered in his favor; and the judgment further recites, “that this agreement between the parties is made and entered into as a compromise and final settlement of the matters and things in controversy in this suit,”—the defendant is not thereby precluded, in a subsequent chancery suit, instituted by him as an assignee of the equity of redemption, against the plaintiff as mortgagee, from insisting that the amount paid by him under the judgment shall be credited on the mortgage debt.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. JAMES B. CLARK.

THE material facts of this case, stated in the order of their occurrence, are these: In August, 1846, one James McNaughten executed a mortgage, by which he conveyed a tract of land to Barron, Meade & Co., to secure the payment of a promissory note therein described, and which contained a power of sale in the event of the non-payment of the note on or before the 1st January, 1847. The land was sold by the sheriff, on the first Monday in January, 1849, under a *venditioni exponas* issued from the circuit court, which was founded on the levy of sundry executions on judgments rendered by a justice of the peace; at which sale, Lucien Meade, one of the partners composing the firm of Barron, Meade & Co., became the purchaser, and received the sheriff's deed. In May, 1851, Meade instituted an action of trespass to try titles, against Wm. K. Paulling, to recover the possession of the land, with damages for its detention; and in May, 1853, recovered a judgment, of which the following is a copy:

“This day came the parties, by their attorneys; and it appearing to the satisfaction of the court, that the defendant has voluntarily abandoned the possession of, and all claim of title to the premises sued for, and that the said

plaintiff has taken possession thereof; thereupon came a jury," &c., "who, being duly elected," &c., "well and truly to assess the plaintiff's damages for the detention of the premises and the trespass thereon, upon their oaths do say, that they assess plaintiff's damages at the sum of two hundred dollars. It is therefore considered by the court, that the plaintiff recover of the defendant the said sum of two hundred dollars, his damages assessed by the jury as aforesaid, and also his costs of suit."

In the spring of 1851, (the precise time is not shown by the record,) Meade instituted an action at law against Paulling, to recover the statutory penalty for cutting down trees on the mortgaged land; and the declaration also contained a count for money had and received. From the defective statement of the pleadings contained in the record, it is impossible to say on what issue the cause was tried. At the November term, 1853, a judgment, on the verdict of a jury, was rendered for the plaintiff, for fifteen hundred dollars damages; but, on a subsequent day of the term, the defendant having moved for a new trial, the following judgment was rendered in the cause: "Came the parties, by their attorneys; and the defendant moves the court for a new trial, because the finding of the jury is excessive, and on the ground of surprise," &c.; "and the motion being heard and considered by the court, the said plaintiff now here agrees and consents, that the verdict of the jury, and the judgment of the court in this cause, be reduced to three hundred and fifty dollars; and the said defendant consents, that judgment be entered against him, for said sum of three hundred and fifty dollars; and this agreement between the parties is made and entered into as a compromise and final settlement of the matters and things in controversy in this suit. Thereupon, it is considered by the court, that the verdict of the jury be reduced to the sum of three hundred and fifty dollars, and that said plaintiff recover of said defendant the said sum of three hundred and fifty dollars, and also his costs."

On the 11th March, 1854, Paulling filed his bill in

equity, against Barron, Meade & Co., for a redemption of the mortgaged land, and an account of the rents and profits; claiming the right to redeem as assignee of the equity of redemption, and also as assignee of several of the judgments under which the land had been sold by the sheriff; and he also filed an amended bill, a few day afterwards, asking an injunction of the judgment which Meade had obtained against him, as above stated, for cutting trees on the land. The defendants demurred to the bill, for want of equity; and they also filed answers, in which they denied the complainant's right to redeem. On final hearing, on pleadings and proof, the chancellor dismissed the bill; but his decree was reversed by this court, on appeal, at its January term, 1858, and the cause remanded; the court holding, that the sheriff's sale of the lands, at which Meade became the purchaser, was a nullity; and that the complainant, as an assignee of the equity of redemption, might maintain a bill in equity to redeem.—See the case reported in 32 Ala. 9-12.

At the March term, 1859, the cause was again submitted to the chancellor, who, without a reference, rendered the following decree: "This cause came on to be heard, on bill, answer, testimony, &c.; and, upon consideration thereof, it is ordered, that the injunction heretofore granted be perpetuated. It is further ordered, that the complainant pay to the defendants the sum of \$317 43, with interest from this date. It is further ordered, that the defendant, within ten days after payment of said sum, execute and deliver to the complainant a quit-claim deed to the land described in the bill. It is further ordered, that the defendants pay the costs of suit, and that execution may issue. The amount which appears to be due on the mortgage debt, is \$723 59; and the amount due Paulling, by reason of damages and costs on the judgment against him in favor of the defendants, is \$406 16; which leaves a balance of \$317 43."

From this decree each party appeals, and each assigns the decree as error.

W. M. BROOKS, for the defendants.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

A. J. WALKER, C. J.—The bill in this case is to be regarded as filed by the assignee of an equity of redemption, for the purpose of redeeming the mortgaged lands.—*Paulling v. Barron, Meade & Co.*, 32 Ala. 9. It appears very conclusively, that the mortgagees were never in possession of the land, until the recovery in the action of trespass to try titles by Meade against the complainant; and we have no evidence that either of them ever received any rent for the land after that recovery. Lesueur, the only witness who testifies on the subject, deposes that, the houses and fences having gone into decay, he, as the agent of the defendants, permitted the complainant to have the place as a pasture; and we infer from the testimony that the complainant paid no rent. Upon this state of the case, the defendants are not chargeable with rents, other than those recovered in the action of trespass to try titles. The mortgagee is only responsible, in a suit to redeem by the mortgagor or his assignee, for rents actually received, unless he has been guilty of fraud or willful neglect.—3 Powell on Mortgages, 939 *a*; 1 Hilliard on Mortgages, 418, § 3.

The crediting of the mortgage debt with the amount of rents received by one of the mortgagees, was proper. It is conceivable that a mortgagee might have a right to the rents and profits of the mortgaged land, derived from a source extrinsic and independent of the mortgage. If a mortgagee were by virtue of such a right to receive rents, the sum so received could not be appropriated in abatement of the mortgage debt. In this case, the mortgagee *in fact* had no right to the rents and profits, except such as the mortgage gave.

[2.] But it is said, that the judgment for the recovery of the land, and the rents by way of damages for its detention, was rendered in favor of one of the mortgagees, against the defendant; that a right of action, resulting from the mortgage, appertained to the two mortgagees jointly;

that therefore a recovery by one mortgagee, by its intrinsic force, demonstrated that it was based upon a right independent of the mortgage; and that the complainant, being the party defendant to the judgment, was estopped from controverting that inference from the judgment in favor of the single mortgagee. To this argument we can not assent. The judgment entry recites, that the defendant voluntarily abandoned the possession of the land, and all claim of title to it; that the plaintiff had taken possession thereof; that thereupon came a jury, who assessed the damages of plaintiff; and a judgment for the damages so assessed is rendered. The court, in its *consideratum est*, adjudges nothing, except that the plaintiff recover the assessed damages and costs; and the ascertainment by the verdict of the jury is not more extensive than the consideration of the court. The record, upon its face, is absolutely silent as to the source whence the plaintiff derived his claim.

Judgments may be conclusive as to the facts necessarily involved in them.—*Wittick v. Traun*, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504; *Saltmarsh v. Bower*, 34 Ala. 613. That the plaintiff in the judgment derived his claim to the damages recovered from a source independent of the mortgage, is not necessarily involved in the judgment, or implied by it. It may as well comport with the supposition, that it was submitted to by the defendant upon the idea that a right to recover enured to the plaintiff as a member of the partnership to which the mortgage was given, or that the plaintiff had acquired the interest of the other mortgagee. The inference attempted to be forced upon the complainant, from his submission to the assessment of damages, is not a necessary deduction, and he can not be precluded from asserting the contrary. As mortgagee, the defendant Meade had a right to receive the rents and profits. We think his own answer shows, that he had no other real right. The pretense that he had acquired a right by the purchase at execution sale, is met with a flat negation by the decision of this court when we before

passed upon it, for that decision declares the sale invalid.—32 Ala. 9. One of the mortgagees having, by virtue of the judgment, collected from the complainant rents and profits, the sum so collected is a proper credit on the mortgage debt, in taking the account of the same requisite to authorize a redemption.

[3.] The court erred in crediting upon the mortgage debt the sum paid in discharge of the costs adjudged against Paulling. We know of no principle, upon which either a mortgagor, or his assignee, can impose upon the mortgagee the burden of reimbursing costs, which may have been incurred in an unsuccessful attempt to defend the possession of the land, or resist the collection of rents and profits.

The mortgagees are not entitled to have from the complainant any fees which they may have paid their attorneys.

[4.] We think a permanent injunction of the judgment against the complainant for cutting timber trees ought to have been granted, in such a manner as to become operative upon the discharge of the mortgage debt, and the consummation of the redemption by the complainant. A comparison of the parts of the bill and answer which speak of the judgment, leads us to the conclusion, that, under the rules of pleading, the fact that the judgment was founded on penalties for cutting timber must be regarded as established. The mortgagee, standing by the law in the light of a bailiff for the mortgagor or his assignee, must be chargeable with whatever profit he received by virtue of his mortgage title.—3 Powell on Mort. 946; 1 Hilliard on Mort. 417. Penalties for cutting timber from the mortgaged premises constitute a profit, with which one standing in the attitude of a bailiff is chargeable. The plaintiff in the judgment had, in fact, no other title than that of mortgagee; and, for reasons already stated in reference to another judgment, we decide, that the judgment founded upon the cutting of timber, in the name of one of the mortgagees, does not conclusively imply that the plaintiff had a title independent and extrinsic of his character of mortgagor. If the plaintiff in the judgment were to re-

ceive payment of it, it would be appropriated by the law to the discharge, *pro tanto*, of the mortgage debt; and therefore, if the complainant discharges that debt, the judgment ought to be perpetually enjoined, except as to the costs; but the perpetual injunction ought not to be operative, until the discharge of the mortgage debt.

[5.] There was nothing in the settlement, upon which the reduction of the judgment was based, which precludes the complainant from setting up his equitable rights in this case. That settlement is restricted to the matters in controversy in that particular suit, which pertained to the legal, not to the equitable rights of the parties.

On the appeal by the complainant, the chancellor's decree is affirmed; on the appeal by the defendants, the decree is reversed, and the cause remanded.

WILLIAMS *vs.* PEARSON,

[BILL IN EQUITY AGAINST EXECUTOR AND GUARDIAN FOR ACCOUNT AND SETTLEMENT OF ESTATE.]

1. *Jurisdiction of equity over charities.*—The doctrine is settled in this State, that the chancery court has jurisdiction, by virtue of its original, common-law powers, without claiming prerogative powers, and without the aid of the statute of 43d Elizabeth, to uphold bequests to charitable uses, where an ascertainable object, recognized as charity, is designated by the testator in general or collective terms, although no trustee is appointed by him, or the trustee appointed is incapable of taking the legal interest.
2. *Bequests to charity held valid.*—An executory bequest of money to “Pilgrims’ Rest Association,” “to be loaned out by commissioners to be appointed by said association, and the interest to be equally divided annually between the ministers having charge of churches in said association:” and a similar bequest to “Vienna and Cochran’s Mill Beat,” to be received and loaned out by three commissioners elected by the people of the beats, the interest to be collected annually, “and applied by said commissioners to the education and tuition of all the pauper and poor children of said beats whose parents are not able to support them,”—are both valid, and will be upheld in equity.

3. *Bequest to daughter "and begotten heir or heirs of her body," with executory bequest over to charity.*—Where the testator, after giving several specific legacies, by the sixth clause of his will, bequeathed "the residue" of his property, which was described as consisting of a tract of land and certain slaves, to his daughter, "and the begotten heir or heirs of her body;" then directed "the balance" of his estate to be sold, and the proceeds of sale, after payment of his debts, to go to his daughter; and, by the seventh clause, directed that, "if she should die without a surviving heir or heirs of her body," "all her property" should be sold, "and all her estate be equally divided into two parts," which he bequeathed to valid charities,—held, that the executory bequests included the *corpus* of all the property given to the daughter by the sixth clause, but did not include the rents, income, and profits of the estate, remaining undisposed of at her death, since they vested in the daughter absolutely.

APPEAL from the Chancery Court of Pickens.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 28th April, 1860, by Mrs. Dacey Williams, against Joel E. Pearson, as the guardian of Sally Ann Taylor, deceased, and as the executor of Zealous Taylor, deceased, for an account and settlement of the estate which went into his hands in his double capacity of executor and guardian. Zealous Taylor died in February, 1851, having executed and published his last will and testament, which was dated the 8th July, 1848, and duly admitted to probate after his death. By the first clause of his will, the testator directed his debts to be paid; the second, third, fourth, and fifth clauses gave several specific legacies; and the sixth and seventh clauses, the construction and effect of which involve the material questions of the case, were in the following words:

"*Item sixth.* And the residue of my property, both real and personal, I will and bequeath to my beloved daughter, Sally Ann Taylor, and the begotten heir or heirs of her body; consisting of between six and seven hundred acres of land, adjoining the tract on which I live, besides the dower in Matthew Taylor's land, together with thirteen negroes, namely," (specifying their names,) "together with their increase. It is my will, that the balance of my estate be sold, on a credit of twelve months, and the pro-

ceeds, after paying my just debts, to go to my daughter, Sally Ann Taylor, except my two best beds, bedsteads, and furniture, and all my made bed-covers, her mother's saddle, all my trunks and books, which are to be exempt from sale, and to be well taken care of for my daughter.

“Item seventh. I do hereby constitute and appoint my friends and neighbors, Vincent Bunting and Joel E. Pearson, the executors of this my last will and testament; and it is my will, that they make no return of my estate until it is ready for final settlement, and that the inventory, account of sales, and the account-current of my estate, be returned at the same time (final settlement), so that all the papers may be found together; and it is my will, that my executors settle my estate as soon as the nature of the case will admit of; and, on final settlement of my estate by my executors with the court, my will is, that my friend Vincent Bunting take the guardianship of my daughter, Sally Ann Taylor, and the care of her property; and that her guardian and Joel E. Pearson, and their wives, take charge of my daughter; and my will is, that she remain at Joel E. Pearson's, and be sent to school with his daughters, and be treated as his own daughters, and for him to be paid whatever is right for her board, clothing, and medical aid; that Mrs. Pearson take one of her beds and half her bed-clothes, and Mrs. Bunting take the other half,” &c. “It is my will for her to have a good education as her property will admit of; and that her guardian hire out her negroes, publicly or privately, as he may see proper, and for them not to be hired out on the west side of the river, nor in the prairies any where, as I want good care taken of them, and want them well clothed, shod, and good bed-clothes procured for them. Also, I want my lands, orchards, and grove taken good care of, as I want all the above to be beneficial to my daughter when she is in a situation to receive them. And if she should die without a surviving heir or heirs of her body, my will is, that all her property shall be sold, on a credit of one, two, and three years installments, and all her estate to be equally divided into two

parts; one half of said estate I loan to *Pilgrim's Rest Association*, to be received by said association, and loaned out by commissioners to be appointed by said association, at eight per cent. *per annum*, and said interest to be equally divided annually between the ministers having charge of churches in said association; and the other half I loan to *Vienna and Cochran's Mill Beat*; and my will is, that three commissioners be elected by a general vote of the two beats, to receive the money, by their giving good and sufficient security, in double the amount which they may receive, to the judge of the county court of Pickens county; and said commissioners to loan out said money, at eight per cent. interest; and the said interest to be collected annually, and applied by said commissioners to the education and tuition of all the pauper and poor children of said beats, whose parents are not able to support them."

Both of the executors named in the will qualified, and took on themselves the execution of the trust; but, on the 30th June, 1853, Bunting made a final settlement, resigned his office of executor, and renounced the guardianship of Sally Ann Taylor; and at the same time Pearson made a partial settlement, gave a new bond and qualified as sole executor, and also qualified as guardian of Sally Ann Taylor. In October, 1857, Sally Ann Taylor died, intestate, unmarried, and under the age of twenty-one years. On the 11th January, 1858, Pearson made a final settlement of his guardianship of her estate; and on the 24th December, 1859, letters of administration on her estate were granted to the complainant. The bill sought an account and settlement of all the defendant's acts as executor and guardian; insisted that the settlement of his guardianship was void, because no administrator of the ward's estate had been appointed; and that the bequests to charitable uses, contained in the seventh clause of the testator's will, were invalid.

The chancellor held, on demurrer, that the executory bequests were valid, and included all the property devised and bequeathed to Sally Ann Taylor, with the rents, in-

come, and profits thereof, remaining undisposed of at her death; and, consequently, that the complainant had no interest which she could assert by bill. He therefore dismissed the bill, and his decree is now assigned as error.

E. W. PECK, for the appellant.

TURNER REAVIS, *contra*.

R. W. WALKER, J.—It is not denied that, according to the law of charitable uses, as administered in the English court of chancery, the executory bequests contained in the seventh item of this will would be upheld. But it is insisted, that the authority of the English court of chancery, in regard to donations to charitable uses, so far as it differs from the power exercised in other cases of trust, is either derived from the statute of 43d Elizabeth, ch. 4, known as the ‘statute of charitable uses,’ or belongs to the chancellor as a branch of the prerogative power of the king; and that apart from the prerogative power with which the chancellor is clothed, and independently of the statute of Elizabeth, the jurisdiction of the court of chancery, over bequests and trusts for charity, is precisely the same as over bequests and trusts for other lawful purposes, and must be exercised upon the same principles, and by the same rules. It is further insisted, that the statute of 43d Elizabeth is not in force here; and that this being so, and inasmuch as our chancery courts are not clothed with the prerogatives of the crown, and exercise no other than judicial power, it follows, that the English law of charitable uses, so far as it differs from the law governing bequests and trusts for other lawful purposes, cannot be recognized by our courts. If these propositions can be maintained, it results, that the validity of these bequests must depend upon the principles applicable to bequests and trusts in general, and not upon the peculiar doctrines which prevail in England in regard to charitable donations, as distinguished from gifts for other purposes; and consequently, if the bequests would have been void, had their purposes not

been charitable, the fact that their purposes are charitable does not make them valid.

Few questions have been the subject of more laborious investigation, or given rise to greater conflict of opinion, than that which relates to the origin of the peculiar jurisdiction of equity in respect to charities. Many eminent jurists sustain the view which has been pressed upon us with so much ability by the counsel for the appellant, and trace the English law of charitable uses, so far as it differs from the law of trusts in general, either to the statute of the 43d Elizabeth, or to the prerogative power of the king, which the chancery exercises as the personal representative of the crown. Such seems to have been the opinion of Lord Loughborough.—*Attorney-General v. Bowyer*, 3 Vesey, Jr. 714, 726. Chief-Justice Marshall held substantially the same doctrine, in the case of the *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1. So, likewise, has Chief-Justice Taney, in the case of *Fontain v. Ravenel*, 17 How. (U. S.) 391, *et seq.*; and in a recent case, in an opinion marked by great ability and research, a majority of the court of appeals of New York came to the same conclusion, and held that, in New York, where the court of chancery is not endowed with any portion of the prerogative power, and where the statute of Elizabeth is not in force, the jurisdiction possessed by the chancery courts over charitable trusts is limited to that which is exercised by the court of chancery in England over trusts in general.—*Owens v. Missionary Society*, 4 Kernan, pp. 380, 388, 403, 405. See, also, *Gallego v. Attorney-General*, 3 Leigh, 450; *Literary Fund v. Dawson*, 10 Leigh, 147; *Janey v. Lalane*, 4 *ib.* 327; *Dashiel v. Attorney-General*, 5 H. & G.; *Green v. Allen*, 5 Hump. 170; *Moore v. Moore*, 4 Dana, 357.

On the other hand, another class of jurists maintain, that the English law of charitable uses does not derive its origin from the statute of the 43d Elizabeth, nor depend upon it; but that at a remote period in English judicial history it was engrafted upon the common law, its general maxims being derived from the civil law; that the statute

of Elizabeth introduced no new principle, but was designed to afford a new and less dilatory mode of establishing charitable donations, which were understood to be valid by the laws antecedently in force; and that, independently of the statute of Elizabeth, and apart from the royal prerogative, there is an inherent jurisdiction in equity to establish and enforce devises and grants to charities, which, but for the charitable feature, would be void.

Thus, in the case of the *Attorney-General v. Skinners' Company*, 2 Russ. Ch. 407 (420), Lord Eldon intimated, that, independent of, and antecedent to the statute of Elizabeth, there was in the court of chancery a jurisdiction "to render effective an imperfect conveyance for charitable purposes." Lord Redesdale, in a case in the house of lords, declared, that the statute of Elizabeth "only created a new jurisdiction—it created no new law."—*Attorney-General v. Mayor, &c.*, 1 Bligh, N. S., 312, 347–8. And Lord-Chancellor Sugden, after a thorough review and analysis of the cases, came to the conclusion, that there was an inherent jurisdiction in chancery, existing before, at, and after the time of the statute of Elizabeth, to sustain devises to charitable uses, which were void at law.—*Incorporated Society v. Richards*, 1 Dr. & W. 258. Chancellor Kent says: "The fact, I think, may be considered indisputable, that charitable uses are lawful uses by the common law, and that the statute of Elizabeth was only an ancillary remedy, now supplied by chancery as the rightful original tribunal for such trusts."—2 Kent's Comm., note (b), p. 288.

Our investigation of the cases has satisfied us, that the current of American authorities is in favor of the doctrine, that trusts for charitable uses are favored by courts of equity, and that, independent of the statute of Elizabeth, and of the prerogative power, there is an original and inherent jurisdiction in those courts to sustain, on account of their charitable purposes, trusts which, but for the charitable feature, would be held void.—*Executors of Burr v. Smith*, 7 Vermont R. 241; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127; *Magill v. Brown*, Brightly's R. 350; *Kursken v. Lu-*

theran Churches, 1 Sandf. Ch. 439; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Wright v. Trustees, &c.*, 1 Hoffm. Ch. 202; *Potter v. Chapin*, 6 Paige, 639; *Dutch Church v. Mott*, 7 Paige, 79-80; *Orphans' Asylum v. McCartee*, 9 Cowen, 437, 470, 476-7; *Williams v. Williams*, 4 Selden, 525; *Whitman v. Lex*, 17 S. & R. 88; *Mayor v. Elliott*, 3 Rawle, 170; *Zimmerman v. Anders*, 6 W. & S. 218; *McCord v. Ochiltree*, 8 Blackf. 21; *Dixon v. Montgomery*, 1 Swan, 348, 366; *Attorney-General v. Jolly*, 1 Rich. Eq. 99; *Gibson v. McCall*, 1 Rich. L. 174; *Beall v. Ex'r of Fox*, 4 Geo. 404, 427; *Going v. Emery*, 16 Pick. 107; *Urmeys Ex'rs v. Wooden*, 1 Ohio St. R. 160.

In *Carter v. Balfour*, (9 Ala. 814,) this court, after a careful examination of the subject, gave its sanction to the doctrine just stated. In that case, the bequests, which were to certain unincorporated charitable societies, were plainly void, upon the principles applicable to ordinary bequests and trusts.—Appendix, 3 Peters, 488; *Williams v. Williams*, 4 Selden, 540; *McCord v. Ochiltree*, 8 Blackf. 16; *State v. Gerard*, 2 Ired. Eq. 218; Hill on Trustees, 131. But it was held, that, being charitable bequests, a court of equity could give them effect by virtue of its common-law and judicial powers, without claim to any *prerogative* power, and without invoking the aid of the statute of 43d Elizabeth. A decision, thus deliberately made, upon a question involved in so much doubt and obscurity, and upon which so much may be said on both sides, we are not disposed to disturb. Without intimating, therefore, what our opinion would be if uncontrolled by any former adjudication, we content ourselves with saying, that it must be regarded as the settled law of this State, that charitable donations are so far exempted from the rules applicable to other trusts, that it is not necessary to their validity that there should be a grantee or devisee capable of taking or holding by law, or that there should be a *cestui que trust* so definitely described as to enable a court of equity to execute the trust upon its ordinary principles. Such we understand to be the doctrine to be deduced from

the case of *Carter v. Balfour*, *supra*, and the other authorities above cited.

It will be perceived, that we do not recognize the whole of the English doctrine of charities as in force here. A considerable portion of it is not adapted to our political condition, and has been rejected by our courts. In England, whenever anything is given to charity, and no charity appointed,—that is to say, where the testator declares his intention in favor of charity indefinitely, without any specification of objects; or where the charity which is appointed is superstitious, the power of appointment vests in the king as *pater patriæ*, and is exercised by him through the chancellor.—Willard's Eq. Jur. 580. So, likewise, when a definite object of charity is specified, which fails, or becomes impracticable, so that the fund cannot be applied to the charity intended by the testator, the court will, under the doctrine of *cypres*, apply it to some kindred or analogous object of charity. The power exercised by the English court of chancery, in the two classes of cases just mentioned, is not judicial power, and does not belong to our courts.—*Carter v. Balfour*, 19 Ala. 814; *Moore v. Moore*, 4 Dana, 366-7; *Williams v. Williams*, 4 Selden, 548; Hill on Trustees, m. p. 128, *note*. But, the *cypres* doctrine and the prerogative power to carry out indefinite charities being excepted, the law of charities, as administered in the English court of chancery, is substantially our law.

Accordingly, when an ascertainable object, recognized as charity, is designated by the donor, in general or collective terms,—as the poor of a given county or parish, or the clergymen of a particular denomination having charge of churches within a specified district, the gift or legacy will be upheld by a court of equity. Nor is it any objection to the validity of such a gift, that the donor has appointed no trustee, or that the trustee appointed is incapable of taking the legal interest. If the object of a charitable donation can be ascertained, the want of a trustee will be supplied by appointment by a court of equity.—*Washburn*

v. Sewell, 9 Metc. 280; *Winslow v. Cumming*, 3 Cushing, 365; *Moore v. Moore*, 4 Dana, 358-9; *Attorney General v. Jolly*, 1 Rich. Eq. 109; 2 Story's Eq. §§ 976, 1059; *Willard's Eq.* 424, 580.

In both of the bequests under consideration, the objects of the testator's bounty are so designated that they may be readily found. It is plainly to be inferred from the language used, that "*Pilgrim's Rest Association*" is a society which extends over a particular section of country; and the fund is "to be equally divided annually between the ministers having charge of churches in said association". In the other bequest, the beneficiaries named are "all the pauper and poor children" of two designated *beats*, "whose parents are not able to support them". When this will was executed, a *beat* in this State was a well-known legal subdivision of a county, corresponding to the townships or towns in some other States. It is clear, upon the principles above laid down, and also according to the adjudged cases, that, in both instances, the testator's designation of the objects of his bounty is sufficiently specific, and that the bequests are valid.—*Whitman v. Lex*, 17 S. & R. 88; *Pickering v. Shotwell*, 10 Barr, 23; *Zimmerman v. Anders*, 6 W. & S. 208; *State v. Gerard*, 2 Ired. Eq. 210; *McCord v. Ochiltree*, 8 Blackf. 15; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Williams v. Williams*, 4 Selden; *Dickson v. Montgomery*, 1 Swan, 348; *Urney v. Wooden*, 1 Ohio St. R. 160; *Attorney-General v. Clark*, 1 Ambler, 422; *West v. Shuttleworth*, 2 M. & K. 684; *Attorney-General v. Gladstone*, 13 Sim. 7; *Attorney-General v. Comber*, 2 Sim. & Stu. 93.

Whether they could have been sustained upon the general doctrine of trusts, had the objects not been charitable, is a question we need not consider. See, however, authorities cited *supra* as to the invalidity of the bequests in *Carter v. Balfour*, considered apart from the rules peculiar to charities.

[3.] These bequests being ascertained to be valid, the next question is, what do they include. And here we concur with the chancellor, in holding that they embrace all the

property which, by the 6th item of the will, is given to the daughter—not only the land and negroes, but that which the testator designates as “the balance of his estate”, and directs to be sold, the proceeds, after the payment of his debts, to go to his daughter. But the chancellor held, that these charitable bequests embraced not only the *corpus* of the property devised to the daughter, but also all the rents, profits, and income thereof, left undisposed of by her at her death. In this we think there was error. The estate which the daughter took under the 6th item of the will, was a fee, determinable on her dying without a surviving heir or heirs of her body.—*Chrystee v. Phyfe*, 19 N. Y. 345 (357–9). In any event, therefore, her estate would endure for her life, and she had at least all the rights of a tenant for life. Hence, she was entitled to the rents, income, and profits of the estate, in absolute right, with full power to use and dispose of them as she might see fit.—2 Bla. Com., m. p. 122; 4 Kent, 73.

As the daughter had the absolute right to the rents, income, and profits, and could use and dispose of them to any extent she might desire, without liability to account therefor, there could be no limitation over of them by way of executory bequest.—*Allen v. White*, 16 Ala. 186; *Flinn v. Davis*, 18 Ala. 162; *Weathers v. Patterson*, 30 Ala. 404; *McRee v. Means*, 34 Ala. 368. If, therefore, we can suppose that it was the intention of the testator to include in the executory bequests the rents, income, and profits of his daughter's estate, remaining undisposed of at her death, these bequests over must, to that extent, be held void, and the rents and profits left undisposed of by the daughter belong to her estate, and go to her personal representative.

Decree reversed, and cause remanded.

STONE, J., not sitting.

FOWLKES *vs.* MEMPHIS & CHARLESTON RAIL-
ROAD COMPANY.

[ACTION TO RECOVER DAMAGES FOR DEATH OF SLAVE.]

1. *Amendment of complaint.*—Where the original summons and complaint are in the name of “C. L. F., guardian of R. H. F.,” the complaint cannot be so amended (Code, § 2403) as to make the plaintiff “R. H. F., by his next friend, C. L. F.”

APPEAL from the Circuit Court of Madison.
Tried before the Hon. S. D. HALE.

This action was brought to recover damages for the loss of a slave, who was run over and killed by the defendant's engine and cars. The summons and complaint were in the name of Cynthia L. Fowlkes, guardian of Ransom H. Fowlkes. The plaintiff asked leave to amend the complaint, so that the suit might run in the name of Ransom H. Fowlkes, by his next friend, Cynthia L. Fowlkes; but the court refused to allow the amendment. This ruling of the court, to which, as the judgment entry recites, the plaintiff excepted, (though there is no bill of exceptions in the record,) is the only matter assigned as error.

S. D. J. MOORE, for appellant.

R. C. BRICKELL, *contra*.

A. J. WALKER, C. J.—In the original summons and complaint, Cynthia L. Fowlkes was the sole plaintiff, and Ransom H. Fowlkes was in no sense a party to the suit. The change proposed would have converted it into the suit of Ransom H. Fowlkes alone. The *prochein amy* of an infant plaintiff is not himself a plaintiff. He is but a species of attorney, who is permitted to act for the infant, so far as to conduct his suit; but his power is comprised within a very narrow compass, as he is not even authorized

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to receive the amount which may be recovered by the infant.—See *Isaacs v. Boyd*, 5 Porter, 390; *Smith v. Redus*, 9 Ala. 99; *Sutherlin v. Goff*, 5 Porter, 508; *Hooks v. Smith*, 18 Ala. 338. Our previous decisions constrain us to hold, that the amendment proposed—the striking out of the sole plaintiff, and the substitution of another person—was not authorized by the Code.—*Laird v. Moore*, 27 Ala. 326; *Friend v. Oliver*, 27 Ala. 532; *Stodtler v. Grant & Nickles*, 28 Ala. 419.

Judgment affirmed.

R. W. WALKER, J., not sitting.

DILLINGHAM vs. BROWN.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Proof of execution of deed*.—Where there are no attesting witnesses to a deed, executed by the grantor in an official character, proof of his handwriting, and of his official character at the date of the deed, is sufficient proof of its execution.
2. *What constitutes color of title and adverse possession*.—A tax-collector's deed is color of title, and possession taken and held under it is adverse possession.
3. *Against whom statute of limitation runs*.—Although the statute of limitations does not run against the United States, it runs against any private individual who holds such a legal title as, without a patent, will support an ejectment.
4. *Indian reservation; what title will support ejectment*.—A transfer by a Creek Indian of his reservation under the treaty of 1832, approved by the president of the United States, confers on the transferee such title as will support an ejectment; but an assignment or transfer of such approved contract, not under seal, does not convey such title to the assignee.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by George W. Dillingham.

against Benjamin G. Brown, to recover an undivided fifth part of a certain tract of land, with damages for its detention; and was commenced on the 27th February, 1858. The defendant pleaded not guilty, with leave to give in evidence any special matter of defense. The plaintiff derived title under a patent from the United States, dated the 29th September, 1857, which recited, that the land was the reservation of a Creek Indian under the treaty of 1832, and that the reservee had sold and conveyed it on the 30th April, 1834, with the approval of the president of the United States, to one Mills, who afterwards transferred it to one Mims, who afterwards transferred it to one Cowart, who afterwards transferred one-fifth to the plaintiff. The defendant claimed under a tax-collector's deed to one Kemp, dated the 3d April, 1843, and a quit-claim deed from Kemp to himself, dated the 20th August, 1844; and proved, that he had been in possession since 1845, claiming title. The court admitted the tax-collector's deed in evidence, on proof of the grantor's handwriting, and of his official character at the date of the deed; and the quit-claim deed from Kemp, on proof of his handwriting. "The plaintiff objected to the admission of each deed as evidence, because mere proof of the handwriting of the grantor did not authorize their introduction for any purpose, and because they showed no defense available against his patent;" and reserved an exception to the overruling of his objection. The defendant offered in evidence a certified transcript from the records of the general land-office at Washington, containing the approved contract for the sale of the land by the reservee, together with the several assignments thereof, on which the plaintiff's patent was founded. The plaintiff objected to the admission of the transfers as evidence, "because they were not under seal, and, therefore, conveyed no legal title;" but the court overruled his objections, and he excepted. There was other evidence in the case, and other exceptions reserved by the plaintiff, which require no particular notice. The court charged the jury, "that, if they believed all the evidence, they must find for

the defendant; to which charge the plaintiff excepted, and which he now assigns as error, together with the several rulings of the court on the evidence.

GEO. D. HOOPER, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

R. W. WALKER, J.—This suit was commenced on the 27th February, 1858. The bill of exceptions states, that “the defendant proved, that he had cleared and built on the tract in 1845, under a tax-title, and had been continually in possession ever since, claiming title;” and as evidence of the tax-title, the deed of W. D. Paylor, tax-collector of Russell county, dated 3d April, 1843, conveying the land to one Kemp, and the quit-claim deed of Kemp, dated 20th August, 1844, conveying to the defendant, were introduced. It does not appear that there were attesting witnesses to either of these deeds; and this being so, evidence of the handwriting of the grantors, and of the official character of Paylor at the time of the tax-sale and the date of his deed, was sufficient proof of their execution.—3 Phill. Ev. (C. & H.’s Notes, ed. 1843,) pp. 1273–4, 1307, 1453–4; 1 *ib.* 476.

[2.] The tax-collector’s deed was color of title, and the possession taken and held under it, was adverse possession. Blackwell on Tax Titles, 665, *et seq.*; *Hearick v. Doe*, 4 Ind. 164; *Crommelin v. Minter*, 24 Ala. 352; *Pillow v. Roberts*, 13 How. 472, 477. Conceding that the tax-title was originally invalid, yet possession held under it, for more than ten years, must bar the claim of the true owner, unless there is something connected with the latter’s title, which renders the statute of limitations inapplicable to him.

[3.] It is supposed that, because the patent under which the plaintiff claims was not issued until the 29th September, 1857, the statute of limitations did not until then begin to run against him, and the defendant’s prior possession under color of title did not operate a bar. It is true, that the

statute of limitations does not run against the government; but it is equally true, that it does run against a private individual who holds a legal title, and is capable of maintaining ejectment.

[4.] It is too late now to doubt, that the *approved* conveyance of a Creek Indian reservee, under the treaty of 1832, vests in the grantee, even before any patent is issued, a legal title upon which he may maintain ejectment for the recovery of the land.—*Jones v. Inge*, 5 Porter, 327; *Fipps v. McGehee*, *ib.* 413; *Rosser v. Bradford*, 9 Porter, 354; *Stevens v. King*, 21 Ala. 432; *Long v. McDougald*, 23 Ala. 413; *Tarver v. Smith*, at the last term. As the grantee may thus sue for the recovery of the land, there is no reason why the statute of limitations should not run against him. It was shown that the land in controversy was a Creek Indian reservation under the treaty of 1832; that the reservee sold and conveyed the same to Columbus Mills; and that the conveyance was approved by the president, on 30th April, 1834. By this conveyance, Mills acquired a legal title, which gave him the right to maintain ejectment; and the transfers proved on the trial did not divest him of the right and title thus obtained, if for no other reason, because they were unsealed writings.—*Thrash v. Johnson*, 6 Porter, 458; *Ansley v. Nolan*, *ib.* 379; *Tarver v. Smith*, at the last term. When, therefore, the defendant took possession under his tax-title, in 1845, there was in Mills a right to recover in ejectment, which would have continued to reside in him until the patent was issued in 1857, if, in the meantime, it had not been barred by the defendant's adverse possession.

The patent shows, upon its face, that it was founded upon, and connected with, the reservee's conveyance to Mills and the transfers subsequently made. It is, indeed, but the completion of the inchoate legal title, which was vested by the reservee's conveyance, and which was sufficient, of itself, to support ejectment; and as the pre-existing title on which the patent was founded, had been barred by the adverse possession of the defendant, before the issu-

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ance of the patent, the right of the defendant is not affected by it.—See, further, *Goodlet v. Smithson*, 5 Porter, 245; *Stevens v. Westwood*, 25 Ala. 716; *Jones v. Inge*, 5 Porter, 327; *Bullock v. Wilson*, *ib.* 338.

As, on the facts proved, the statute of limitations presented a complete defense to the action, it is not necessary for us to notice the other defense relied on.

Judgment affirmed.

ANDREWS vs. KEEP.

[MOTION AGAINST SHERIFF FOR FAILURE TO MAKE MONEY ON FI. FA.]

1. *Where motion may be made.*—A failure to make the money on a *fi. fa.*, when by due diligence it might be made, is a “failure to execute process,” (Code, § 2600,) for which the sheriff may be ruled, either in the circuit court of his county, or in the court to which the process was returnable.
2. *Waiver of jury trial.*—If the defendant makes default, it is the duty of the court to render judgment on the evidence, (Code, § 2599,) without the intervention of a jury.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was a motion against a sheriff, for failing to make the money on an execution. The notice was issued and executed on the 12th April, 1858, and was as follows: “To Warren B. Andrews, sheriff of the county of Dallas—You will take notice, that whereas, on the 22d November, 1856, James M. Keep obtained a judgment in the circuit court of Talladega county, against one Joseph M. N. B. Nix, for the sum of \$437 damages, besides \$12 80 costs; and whereas, also, an execution issued upon the same, on the 5th day of January, 1857, and soon afterwards, to-wit, before the 28th January, 1857, came into your hands as sheriff of the county of Dallas, (you being at that time the regularly qualified and acting sheriff of said county of Dallas.)

whereby you were commanded, of the goods and chattels, lands and tenements of the said Nix, to make the said damages and costs, and also to make due return thereof to the next term of said circuit court, to be by you as such sheriff duly executed; and whereas, also, you failed to make the money on said execution, or any part thereof, when by the use of due diligence, you might have made the same: You are therefore hereby notified, that on Saturday, the sixth day of the term of the circuit court of Talladega county, to be held on the first Monday in May next, or so soon thereafter as the court will entertain the same, the said James M. Keep will move said court for a judgment against you, for the amount of said execution, interest, and ten per cent. damages thereon."

On the 22d May, 1860, the following judgment was rendered in the cause: "Came the plaintiff, by his attorney; and the defendant, Warren B. Andrews, being called, came not, but wholly made default. Thereupon, the plaintiff produced and read to the court the following *notice*, made on the motion docket of this court at the May term, 1858, against the said Andrews, sheriff of Dallas county aforesaid; and showed that the same was made in open court, and had been regularly continued to the present term, and that notice had been served on said Andrews personally, by the coroner of Dallas county, on the 12th day of April, 1858; which said notice, and the return thereof, are as follows," &c. "Thereupon, on motion of the plaintiff's attorney, the court proceeded to hear and determine the motion, and render judgment upon the evidence; and the plaintiff offered evidence, to the satisfaction of the court, showing the truth of the facts in the notice above set forth. It is therefore considered by the court, that the plaintiff, James M. Keep, recover of Warren B. Andrews the sum of \$616 66, the same being the amount of said execution, and interest, and ten per cent. damages, together with the cost of this motion, to be taxed by the clerk of this court; for which let execution issue."

The assignments of error are: 1st, that the court had no

jurisdiction of the motion; 2d, that the court had no power to render judgment without the intervention of a jury; and, 3d, that the court erred in rendering judgment on the notice and evidence, as shown in the record.

BYRD & MORGAN, and GEO. W. GAYLE, for appellant.
L. E. PARSONS, *contra*.

R. W. WALKER, J.—[1.] To “execute process” is to perform its mandate. The mandate of a *fi. fa.* is, that of the property of the defendant the sheriff cause to be made a specified sum of money; and if the sheriff has failed to do this, he has failed to execute the *fi. fa.* Hence, we conclude, that a failure to make the money on an execution, is a failure to execute process,” within the meaning of section 2600 of the Code; and, consequently, that the motion for this default may be made, either in the circuit court of the county in which the sheriff was acting officially at the time of the default, or in the court to which the process was returnable. We adopt this construction of the statute the more readily, as we are satisfied that the practice of the bar of the State has been in conformity with it.

[2.] The court committed no error in rendering judgment without the intervention of a jury. In reference to this class of motions, the Code provides, that “the court must hear and determine the motion, and render judgment upon the evidence, without a jury, unless an issue is tendered, and a jury trial demanded.”—Code, § 2599. Here, the defendant did not tender an issue, and demand a jury trial; and it was the duty of the court, on proof of the requisite facts, to render judgment for the plaintiff.—See *Irwin v. Scruggs*, 32 Ala. 516.

The motion alleges all the facts necessary to render the defendant liable; and the minute-entry, after setting out the notice, recites that the plaintiff offered evidence to the satisfaction of the court showing the truth of the facts therein set forth. This sufficiently shows that the evidence authorized the judgment.

Judgment affirmed.

WALLER vs. SULTZBACHER & PAIGE.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Conditional continuance.*—Where a continuance is granted to the defendant, on the condition that, if the costs are not paid within ninety days after the adjournment of the court, his plea shall be stricken from the file, and the plaintiff have judgment by *nil dicit*; if the costs are not paid within the specified time, the court may, at the next term, strike the plea from the file, and render judgment by *nil dicit* for the plaintiff.
2. *Assignment of error not insisted on.*—In civil cases, the appellate court will notice only those assignments of error which are insisted on by the appellant's counsel in his brief or argument.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the appellees, was commenced by attachment, and was founded on an open account for goods sold and delivered. At the fall term, 1860, an entry was made in the case in the following words: "Came the parties, by their attorneys; and this cause is continued by the defendant, upon the payment of the costs of the term; and this is made a condition precedent, with the further condition that, if the said costs are not paid in ninety days after the adjournment of this court, the defendant's plea shall be stricken from the file, and the plaintiffs shall have judgment by *nil dicit*, with inquiry; which condition is accepted by the defendant, and the defendant admits, in open court, that the account sued on is correct; and the cause is continued." At the next term, as the bill of exceptions states, "when the cause was called, the plaintiff's counsel inquired if the order of the last term had been complied with; to which the clerk replied, that it had not, and that the costs had not been paid. The defendant's counsel then asked, if the court would allow the defendant to pay the costs then, as a compliance with the said order; which the court refused to allow, but required

the plea to be withdrawn, and the correctness of the account admitted, and then rendered judgment by *nil dicit* for the plaintiffs, with a writ of inquiry." The defendant reserved an exception to this ruling of the court, and he now assigns the same as error, together with another ruling of the court on the execution of the writ of inquiry, which requires no particular notice. .

J. FALKNER, for appellant.

BROCK & BARNES, *contra*.

R. W. WALKER, J.—One of the conditions upon which the defendant obtained the continuance at the fall term, 1860, was, that if the costs were not paid in ninety days after the adjournment of the court, the defendant's plea should be stricken from the file, and the plaintiffs have judgment by *nil dicit*, with inquiry. The defendant did not question the right of the court to impose these terms, but accepted the same. The order of the court became thereby an agreement of record between the parties, and the defendant cannot complain that it was enforced against him. The record shows that the costs were not paid within the ninety days; and accordingly the court did not err in striking the defendant's plea from the file, and giving the plaintiff judgment by *nil dicit*.—See *Gowen v. Jones*, 20 Ala. 128; *M. & W. P. Railroad Company v. Persse, Taylor & Co.*, 25 Ala. 537; Code, § 743.

[2.] The assignment of error relating to the exclusion of evidence on the execution of the writ of inquiry, is not insisted on in the appellant's brief, and we will not consider it.

Judgment affirmed.

MCDOUGALD'S ADM'R vs. CAREY.

[CREDITOR'S BILL—BILL OF REVIEW.]

1. *Succession to trust estate on death of trustee; presumed existence of common law elsewhere.*—By statute in this State, (Code, § 1323,) on the death of the sole trustee of an express trust, the trust estate does not pass to his heirs or personal representatives; but the rule at common law was different, and that rule will be presumed, in the absence of evidence to the contrary, to prevail in a sister State; yet a personal representative, appointed in another State, would have no right, by virtue of that appointment, to maintain a suit here to enforce payment of a debt due to the trust estate out of the debtor's assets.
2. *Revivor of appeal.*—On the death of a sole trustee of an express trust, appointed in a foreign jurisdiction where the common law prevails, pending an appeal from a decree in chancery obtained by him here, the appeal must be revived against his successor in the trust appointed here.

APPEAL from the Chancery Court of Russell.
Heard before the Hon. JAMES B. CLARK.

The original bill in this case was filed on the 30th May, 1851, by Edward Carey, as the assignee of the Bank of Columbus, Georgia, on behalf of himself and the other creditors of Daniel McDougald, deceased, against Jesse Wilkerson, as the administrator of said McDougald, and others. Its object was to enforce payment of certain debts due and owing to the Bank of Columbus by said McDougald, out of assets belonging to his estate; to foreclose a mortgage, or deed of trust, executed by said McDougald, by which certain lands, slaves, and other property were conveyed to Seaborn Jones and R. B. Alexander, as trustees; and to enjoin a sale of the property by the administrator. On final hearing, on pleadings and proof, at the November term, 1855, the chancellor dismissed the bill. In March, 1856, Carey filed a bill of review, to which the defendant Wilkerson interposed a demurrer. At the November term, 1858, on final hearing of the bill of review, the chancellor

overruled the demurrer, and rendered a decree, reversing and annulling the decree on the original bill, and ordering the cause to be reinstated on the docket and re-heard. From this decree an appeal was sued out by the defendant Wilkerson, returnable to the January term, 1860. At the June term, 1860, the death of Carey was suggested; and it was thereupon ordered by the court, "that a *scire facias* issue to his representative, when known, to revive." At the January term, 1861, a motion was submitted by the counsel of the appellee to dismiss the appeal, on account of the failure to revive; and, at the same time, the appellant's counsel asked for an extension of time within which to make the necessary revivor. These motions were continued until the present term, when the following opinion was delivered.

GOLDTHWAITE, RICE & SEMPLE, and GEO. D. HOOPER, for appellant.

W. P. CHILTON, L. E. PARSONS, and D. CLOPTON, *contra*.

A. J. WALKER, C. J.—The appellee obtained a decree in the chancery court. The appellant, being defendant therein, appealed. Afterwards, the appellee died. The appellee was only interested as a trustee. The question is now presented, in whose name shall the appeal be revived. Section 1323 of the Code provides, that upon the death of a sole or surviving trustee of an express trust, the trust estate does not descend to the heirs, or pass to his personal representatives. Under this law, it is very clear that a trust, created and subsisting in this State, would not pass, on the death of the trustee, to the heir or personal representative of the deceased trustee, however the rule may have been at common law.—*Maulden, Montague & Co. v. Armistead*, 14 Ala. 702.

But, in fact, the trust here was created in Georgia; and the suit was instituted for the purpose of collecting a debt due the trust, out of an alleged debtor's assets in the State of Alabama. These facts can not change the aspect of

the question. The common law is presumed to prevail in Georgia; and by the common law, the trust title, as to personalty, passes upon the death of the trustee to his personal representative.—*Maulden, Montague & Co. v. Armistead*, *supra*; *Powell v. Knox*, 16 Ala. 364; Hill on Trustees, 303; Lewin on Trusts, 260, 279. Presuming the common law to prevail in Georgia, we must intend that the title to the personalty in that State, belonging to the trust, passed to the personal representative of the trustee.

The personal representative, appointed in Georgia, could, however, exercise no authority beyond the jurisdiction in which he was appointed, and would, therefore, have no authority, by virtue of his appointment in Georgia, to maintain a suit for the purpose of enforcing the payment of a debt due to the trust out of assets of the debtor in the State of Alabama.—*Harrison v. Mahorner*, 14 Ala. 829. It would, therefore, be necessary, in the absence of our statute, that an administration should be taken out in this State, in order that a proper party might be substituted for the deceased trustee. As, however, our statute does not permit the succession of an administrator to the title of the trustee, it is indispensable, that a trustee should be appointed in this State, as the successor of the deceased trustee; and the trustee so appointed is the proper party, against whom the appeal should be revived, in lieu of the deceased appellee. It is our duty to exercise a "general superintendence and control of inferior jurisdictions." This we can not do in this case without making the successor of the deceased trustee a party. We therefore decide, that a revivor against the successor when appointed shall he had, and that for that purpose a *scire facias* may issue.—*Jordan v. Abercrombie & Thompson*, 15 Ala. 580.

We are requested by the appellant to decide, whether it is competent for him to apply to the court of proper jurisdiction for the appointment of a trustee. This question we do not suppose it is important for us to decide. We presume, that now, when it is definitely settled that the

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proper party is a successor of the deceased trustee appointed by the proper tribunal in this State, those who are beneficially interested in the trust will take steps to have such trustee appointed by the next term of this court. If they should, however, fail to do so before the next term of the court, we will then consider what further order it may be necessary for us to make.

The motion to dismiss the appeal is overruled, and further time is allowed to the appellants within which to revive the appeal.

McGEHEE'S ADM'R vs. GEORGE.

[BILL IN EQUITY TO ENJOIN SALE UNDER MORTGAGE.]

1. *Equitable relief against usury.*—Where a debtor borrows money at usurious interest, gives a mortgage or deed of trust to secure its payment, and afterwards comes into equity for relief, he will be required to pay the principal sum due, with legal interest thereon; but rests will not be allowed at each renewal of the debt, so as to convert the legal interest then due into principal.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by John Henderson, as the administrator of Samuel C. McGehee, deceased, against Charles H. George; asking an injunction, to restrain the defendant from selling slaves under a power of sale contained in a mortgage given to him by said McGehee, on the ground of usury in the secured debt, and an account of the amount actually due on the mortgage debt. The defendant admitted the charge of usury, but not to the extent alleged in the bill; and he appended to his answer a statement of the debt, showing a balance of \$1505 55 in his favor, on the 3d February, 1859. At the August term, 1860, on

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motion to dissolve the injunction, the chancellor required the complainant to pay into court the sum of \$1536, which was paid over to the defendant on his executing a refunding bond. At the February term, 1861, the cause was submitted for final decree, on the bill and answer; when the chancellor rendered a decree, dissolving the injunction as to \$168 30 of the mortgage debt, and perpetuating it as to the residue; and his decree is now assigned as error by the complainant.

JOHN HENDERSON, for appellant.
MCGHEE & BRADFORD, *contra*.

STONE, J.—The doctrine is too well settled to admit of further controversy, that when one who has made a usurious promise, comes into equity for relief, in a case in which he has, by his own voluntary act, deprived himself of the opportunity to appear and plead the usury in the character of defendant, he is required to pay the principal sum due, and legal interest thereon.—*Hunt, Frowner, et al. v. Acre, Johnson, et al.*, 28 Ala. 580.

In the present case, Mr. McGehee executed a mortgage security, with power of sale; and he thus armed his creditor with the power to coerce the collection of his demand, without any resort to legal proceedings. Hence, to relieve himself of the usury, it becomes necessary for Mr. McGehee's personal representative to become the actor; and the rule above declared casts on him the duty of paying both principal and lawful interest.

The record informs us, that the debt, for the security of which the present mortgage was executed, was renewed one or more times; and in each instance, usurious interest was embraced in the body of the note. The chancellor, in adjusting the account, allowed rests to be made; and at each renewal, the lawful interest which had then accrued, was regarded as principal, bearing interest from that time. This is shown by the amount for which the decree was rendered.

In this we feel bound to hold that the chancellor erred. The usurious notes, while they were good and valid obligations for the principal sum due, are invalid, and cannot be enforced, for anything beyond that sum. They cannot be regarded as a renewal of the debt in such form as to sink the interest accrued, and constitute it a part of the principal. To allow them such operation, would be to enforce them for a sum beyond the principal.—Code, § 1523. True, the mortgage in such a case as this stands as a security for the principal and simple interest; but this rests on the fundamental principle of the court of chancery, which requires of a complainant that he shall do equity before he demands it at the hands of another.

The case of *Pearson v. Bailey*, 23 Ala. 537, was, in many of its features, like the present one. In that case, as in this, the original contract, and the subsequent renewals, were severally usurious; and the bill was filed by the mortgagor, to arrest the sale, and let in the defense of usury. The chancellor relieved the debtor from the payment of any sum beyond the principal and simple interest upon it; and this court affirmed the decree,—remarking that the mortgage itself was tainted with usury, and could not be allowed to stand as a security for any more than the balance really due of the original debt, and eight *per centum per annum* interest thereon. This case seems precisely in point with the present, and is conclusive of it.—See, also, *Eslava v. Lepretre*, 21 Ala. 530; *Gray v. Brown*, 22 Ala. 273.

In the final decree, the chancellor dissolved the injunction as to the sum of \$168 30, and perpetuated it as to the residue of the demand. By a prior decretal order, the complainant had been required to pay \$1536. Computing simple interest on the sum actually due, untainted with usury, as we gather the same from the pleadings, we find that the chancellor's decree required of the complainant the payment of some twenty-two dollars more than was due. The injunction should have been dissolved for \$146 30, and perpetuated as to the balance. We reverse

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the decree of the chancellor, and here render a final decree in the cause, for the correct amount as stated above; the cost of this court to be paid by the appellee.

AICARDI vs. STRANG, MURRAY & CO.

[ACTION FOR PRICE OF GOODS SOLD AND DELIVERED.]

1. *Deposition ; waiver of notice.*—Filing cross-interrogatories, without objecting to the failure to give notice of the residence of the witness and the name of the commissioner, (Session Acts 1859-69, p. 20,) is a waiver of the notice.
2. *Failure to answer cross-interrogatories fully.*—When a substantial answer is given to a cross-interrogatory, and the deposition contains nothing to show that the witness sought to evade a disclosure of facts within his knowledge, his deposition will not be suppressed on account of his failure to answer specifically all the different parts of the interrogatory.
3. *Competency and examination of defendant as witness for co-defendant.*—Where two persons are sued as late partners, for the price of goods sold and delivered to one of them, and a judgment by default is taken against the one to whom the goods were sold and delivered, he is a competent witness for his co-defendant, to disprove the alleged partnership, though he cannot be compelled to testify against his consent; and where the bill of exceptions shows that he was excluded on the plaintiff's motion, and does not show that he objected to testifying, the appellate court cannot presume that he was excluded on account of his own unwillingness to testify.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellees, against Antonio Aicardi and Robert J. Travers, as late partners, to recover the price of certain goods sold and delivered to said Travers. A judgment by default was taken against Travers. Aicardi pleaded—"1st, the general issue; 2d, that the defendants are not, and never have been partners; and, 3d, the statute of frauds;" and issue was joined on

each of these pleas. Before entering on the trial, as appears from the bill of exceptions, the defendant Aicardi moved to suppress the deposition of B. Bowden, "on the ground that no notice had been given to him, or his counsel, of the names or residences of the commissioners;" but the court overruled the motion, because it appeared that he had filed cross-interrogatories to the witness, without objecting to the want of notice; to which ruling and decision the defendant excepted. The defendant then moved to suppress the deposition, because the witness had failed to answer specific portions of the first cross-interrogatory, and reserved an exception to the overruling of his objection. This interrogatory, and the answer thereto, were in the following words, the italics showing the portions on which the motion to suppress was founded:—

"If you say that any goods were sold by the plaintiffs to the defendants, or either of them, *please give in your answer to this interrogatory a statement of all the goods sold by them, to either of the defendants, since the 1st January, 1856.* State, also, when each of said bills was made, for how much, and by whom. Were any of said bills closed by note? *If yea, by whose note, and for what amount were they given? To which of the defendants was each of said bills of goods sold? by which of them was each paid, and when?*"—Answer: "I cannot give a statement of all the goods sold by plaintiffs to defendants since 1st January, 1856; nor can I state when each of said bills was made, nor for how much, nor by which of the defendants. I cannot do this, because I have not the plaintiffs' books present, nor have I any memorandum that would enable me to make the desired statement. Some of the said bills were closed by note, for the reason given in my direct answers. They were closed by the note of R. J. Travers; one for about \$400, or over; one for \$175 58. He gave other notes, which have been paid by remittances by mail; and my understanding is, that they were paid by the defendant Aicardi. I have already said, that I cannot state to which of the defendants the different bills were sold; nor can I state when they were paid."

“During the progress of the trial, Aicardi offered the defendant Travers as a witness, to prove that no partnership had ever existed between them. The plaintiff objected to his being examined, on the ground that he was incompetent; the court sustained the objection, and would not let said witness be examined; to which the defendant Aicardi excepted.”

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

WHITE & PORTIS, for appellant.

D. S. TROY, *contra*.

R. W. WALKER, J.—In the case of depositions taken upon interrogatories, the statute requires the party taking the same to give the adverse party notice of the residence of the witness, and of the name of the commissioner; and provides that, “on his failure to give such notice, unless waived by the adverse party, the deposition shall be suppressed.”—Acts 1859–60, p. 20. The waiver of the required notice may be implied, as well as express; and it may well be inferred from any affirmative act of the adverse party, amounting to an admission of the right of the party filing the interrogatories to take the deposition upon them without giving the notice. The filing of cross-interrogatories, without objecting to the failure to give the required notice, must be deemed an act of this character. The crossing of the interrogatories would be a work of supererogation, if the adverse party could not properly proceed with the taking of the deposition; and to permit the deposition to be afterwards suppressed, upon the ground of want of notice, would enable parties to experiment, at the expense of their antagonists, upon the testimony of the witnesses.—See *McCreary v. Turk*, 29 Ala. 244.

2. All the questions contained in the first cross-interrogatory to the witness Bowden received a substantial answer; and as we can discover nothing to justify the conclusion that the witness was seeking to evade the dis-

closure of his knowledge of the facts, we think the court did not err in refusing to suppress his deposition on this ground.

3. It is very clear that the defendant Travers, against whom judgment by default had been rendered, was a competent witness for his co-defendant, to prove that they were not partners.—*Scott v. Jones*, 5 Ala. 694; *Gooden v. Morrow*, 8 Ala. 489. It is true that he could not be compelled, against his consent, to testify for his co-defendant; and that the bill of exceptions does not, in express terms, state that he was willing to be examined; but this court will not presume that he was excluded on this ground, when it does not appear that any objection whatever was made by him, but that on his being offered as a witness the court refused to allow him to testify on objection made by the plaintiff.

For this error, the judgment must be reversed, and the cause remanded.

RIVES, BATTLE & CO. vs. WALTHALL'S EX'RS.

[BILL IN EQUITY BY CREDITOR TO HAVE MORTGAGE DECLARED VOID OR FORECLOSED.]

1. *Validity of mortgage.*—The case of *Walthall's Executors v. Rives, Battle & Co.*, (34 Ala. 91.) as to the validity of a mortgage given to indemnify a surety, re-affirmed.
2. *What relief may be had under alternative prayers.*—Whether a creditor may file his bill in a double aspect, asking to have a mortgage, executed by his debtor, declared fraudulent and void, or, if valid, foreclosed for his benefit, is a question which was not decided on the former appeal in this case, as erroneously stated in the second headnote of the former report of the case, (34 Ala. 91,) and which it is unnecessary now to decide, since the bill does not contain alternative allegations to support the alternative prayers.
3. *What relief may be had under creditor's bill.*—A creditor's bill, to obtain satisfaction of a judgment out of the debtor's assets, cannot be maintained, either under the act of 1844, (Session Acts 1843-4, p. 107,)

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or independently of that act, when it shows that all the assets are covered by valid mortgages, and does not make out a case for the foreclosure of the mortgages.

4. *Facts occurring after filing of bill, no ground for relief.*—The equity of a bill cannot be supported by facts occurring after the commencement of the suit, nor can such facts be made the basis of relief.

5. *Amendment of bill.*—Under the act approved February 8, 1858, "amendatory of proceedings in chancery," (Session Acts, 1857-8, p. 230,) the chancellor has a discretionary power to prescribe the terms on which an amendment of the bill shall be allowed.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed on the 20th January, 1847, by Rives, Battle & Co., as judgment creditors of Thomas H. Hill, against said Hill and Richard B. Walthall; and sought to have a mortgage, executed by said Hill to Walthall, declared fraudulent and void as to complainants, or foreclosed for their benefit. Separate answers were filed by the defendants, insisting on the validity of the mortgage, but admitting most of the other material allegations of the bill, and demurring to the bill for want of equity. Walthall died pending the suit, and his executors were brought in by bill of revivor and supplement. The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for the complainants; setting aside the mortgage as fraudulent, ordering an account, &c. On appeal to this court, at its January term, 1859, the chancellor's decree was reversed, and the cause remanded; the court holding, that the bill was wanting in equity, because it nowhere alleged that Hill was the defendant in the complainants' judgment; and that the mortgage from Hill to Walthall was valid.—See the case reported in 34 Ala. 91-97.

Before the former hearing, a supplemental bill was filed, alleging that Edward S. Jones and Benjamin Borden, as trustees under a marriage settlement between Hill and his wife, had possession of some of the slaves embraced in the mortgage from Hill to Walthall, and were receiving the hires and profits; and said Jones and Borden were made

defendants to the bill. After the remandment of the cause, the plaintiffs asked leave to amend their bill, by adding an averment that Hill was the defendant in their judgment, and by making other changes, which were thought necessary, under the opinion pronounced in the cause by this court, to perfect their right to relief. The chancellor allowed the specified amendment and some of the others as proposed, but imposed costs on the complainants, and required them to admit secondary evidence of the marriage settlement between Hill and wife. The cause was again brought to a hearing before him at the June term, 1859, when he rendered a decree dismissing the complainants' bill, but without prejudice to the exhibition of another bill against the personal representatives of Walthall, or against the trustees under the marriage settlement, to subject the hires and profits of the slaves to the satisfaction of the complainants' judgment against Hill; and this decree, together with several rulings on exceptions to evidence, the rejection of some of the proposed amendments, and the terms imposed on the allowance of the others, is now assigned as error.

J. R. JOHN, and P. LOCKETT, for appellants.

W. M. BROOKS, and BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—In support of the complainants' right to relief, three positions are taken. They are—first, that the mortgages described in the bill are fraudulent; secondly, that if not fraudulent, the complainants are entitled to a satisfaction of their judgment out of the mortgaged property, after the discharge of the mortgages; and, lastly, that the bill may be regarded as a creditors' bill, under which satisfaction of the complainants' judgment out of certain property may be had.

1. The first of the three positions can not be sustained; because the allegations of fraud are denied by the answers, and not supported by the requisite measure of proof; and because the arguments in favor of the inference

of fraud, not defeated by the denials of the answer, are overruled by our former decision in this case, reported in 34 Ala. 91.

2. The averments of the bill are such that the second position cannot be sustained. The mortgages are in the bill declared fraudulent, and several grounds for the inference of fraud are set out. The bill contains a specific prayer, that the mortgages may be declared null and void; and another prayer, that, if they are not so declared, the mortgages may be foreclosed, and the mortgages and the judgment of complainants be discharged from the proceeds of sale. We have here alternative prayers, for the annulment of the mortgages, and for their foreclosure for the benefit of the mortgagee and the complainants. It was in view of these alternative prayers, that we said when this case was before in this court, that there were two distinct *claims* to relief *which the complainants set up*.—32 Ala. 91. This assertion by no means involved a decision, that, without an amendment of the bill, alternative cases for the granting of either of the claims to relief was made. Whether the claims set up were respectively predicated upon sufficient allegations, was a point not touched by the decision.

It is certainly permissible for a complainant to aver in his bill, that either one or the other of two alternative statements is true. Undoubtedly it is so when each of the statements entitles the party to the same relief.—*Shields v. Barrow*, 17 Howard, 130-144; Story's Eq. Pl. § 254; *Andrews v. McCoy*, 8 Ala. 920; *Thomason v. Smithson*, 7 Porter, 144; *Simmons v. Williams*, 27 Ala. 507; *Strange v. Watson*, 11 Ala. 324; *Cornegay v. Caraway*, 2 Dev. Eq. 405; *Lloyd v. Brewster*, 4 Paige, 537; *Colton v. Ross*, 2 Paige, 390. But the bill in this case does not contain such alternative statements. It asserts the invalidity of the mortgages on account of fraud, but does not contain a disjunctive averment of their validity. We do not decide that the rules of pleading would tolerate a bill with such conflicting alternative statements, entitling the party to reliefs diametrical in their character. We did not intend,

when this case was before in this court, (34 Ala. 95,) to approve such a mode of pleading. We intended merely to say, that the complainants claimed alternatively the two reliefs, and that the granting of such reliefs pertained to the jurisdiction of the chancery court. The second head-note of the reporter has carried us farther than we designed to commit ourselves at that time. It is not necessary for us now to commit ourselves, as to the extent to which variant statements of facts in the alternative may be allowed. It is sufficient here, that the bill pronounces the mortgages fraudulent, and in no way recognizes their validity. If, then, the court were to grant relief, predicated upon the validity of the mortgages, and making the satisfaction of the complainants' judgment posterior to the satisfaction of the mortgages, and dependent on it, it would be not only in the absence of appropriate allegations, but in actual contravention of the case made by the bill.

A test of the propriety of any particular relief, under the allegations of a bill, is to inquire whether, if the bill were confessed, the court, looking at the bill and the confession, could grant the relief.—*Charles v. Dubose*, 29 Ala. 367-372. Under that test, there could be no foreclosure of a mortgage, under a bill which merely declared it fraudulent. In the case of *McCosker v. Brady*, (1 Barb. Ch. R. 329,) a question precisely like the one before us arose. The complainant in that case alleged, that a will, under which the defendants claimed title to a part of the premises in controversy, was void, and prayed that it might be annulled, or, in case the will should be decreed to be valid, that the premises might be partitioned. The prayer for a partition was held inconsistent with the case made by the bill, and it was therefore denied.—See, also, *Lloyd v. Brewster*, *supra*.

3. The third position taken for the complainants is, that under their bill they may be regarded as creditors, having a return of *nulla bona* on their execution, and coming into chancery to obtain satisfaction of their judgment out of their debtor's assets. The bill alleges, that all the prop-

erty mentioned is covered by mortgage. If the mortgages are valid, the property was not subject to the complainants' judgment, and the complainants could have no other remedy against it than by a foreclosure. We have already decided that the mortgages are not fraudulent. If, then, the complainants' bill be a creditors' bill, it shows that the property against which it proceeds is covered by mortgage, which we must hold valid. Therefore, to subject the property under the bill to the payment, would be, according to the case made by the bill itself, to invade the rights of a mortgagee; in other words, to grant relief in violation of the allegations of the bill and proof. Let it be conceded, that it appears from the answer that the mortgagee did not claim the property under the mortgage, and the complainants' condition is not thereby improved, for a decree must be predicated upon the allegations of the bill.

Nor will it aid the complainants to concede farther to them, that the answers show a discharge of the mortgage since the commencement of the suit; for, if the complainants' bill be a creditors' bill, they can only subject property upon the idea of a liability subsisting when the suit was commenced. A decree can only be had, when the facts subsisting at the commencement of the suit make out a case for equitable cognizance, and those facts must be alleged in the bill.—*Land v. Cowan*, 19 Ala. 297.

It is contended, that the complainants, if not entitled to relief as creditors proceeding against specific property, may at least claim a decree as creditors proceeding upon the general allegation authorized by the act of January, 1844, as expounded in *Brown & Dimmock v. Bates*, 10 Ala. 432. But the same insuperable obstacle is in the way of sustaining this view. Under the allegations of the bill, all the debtor's property was, at the commencement of the suit, covered by mortgages, which we decide were valid.

4. It is strenuously insisted, that the complainants may, under their bill, have the hires and income from the slaves, now held by Borden and Jones, appropriated to their judg-

ment. It is needless for us to say anything upon the question, whether such hires and income might not be so appropriated under a proper bill against Borden and Jones. It is sufficient for this case, that such an appropriation cannot be had in this suit. The complainants' right to relief must be tested under the facts as they existed at the commencement of the suit and are alleged. A decree cannot be had, where the equity rests upon the facts of subsequent occurrence, or on facts not alleged in the bill.

The complainants are not entitled to the relief last above stated, in despite of the mortgages, because they are averred in the bill, and are shown to be valid. They are not entitled to the relief of a foreclosure of the mortgage, and an appropriation of the excess to the payment of their judgment, because they say the mortgages are fraudulent. They are not entitled to the relief upon the ground that the mortgage debts have been satisfied out of the hires and income, for, if that fact exists, it occurred after the commencement of the suit.

5. The chancellor had a discretionary authority to prescribe the terms of the amendment allowed at the June term, 1859, and there is therefore no cause for reversal in the terms prescribed.—Session Acts 1857–8, p. 230. The allowance of the amendments rejected by the chancellor would not have changed the result, nor would different rulings upon the points of evidence called to our attention. It is unnecessary, therefore, for us to notice those subjects in this opinion.

Affirmed.

STONE, J., not sitting.

McCLURE vs. STEAMBOAT JAMES DELLETT.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Statutory lien on steamboats and vessels.*—The statute giving a lien on steamboats and other vessels, for work done or materials supplied, and for the wages of the officers, laborers, and crew, (Code, § 2692.) makes no distinction between the two classes of creditors.

APPEAL from the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THE appellant in this case filed a libel against the steamboat *James Dellett*, for wages due him as a carpenter. The boat was seized and sold, under an order of the court, but did not bring enough to satisfy in full all the claims that were filed and allowed against her. Thereupon, the appellant, with the officers and crew of the boat, moved the court to order the payment of their respective claims in full, in preference to the claims of the material-men. The court refused to do this, and directed the proceeds of sale, after the payment of costs, to be divided *pro rata* among all the creditors whose debts had been proved and allowed; and this ruling of the court, to which an exception was reserved, is now assigned as error.

J. L. SMITH, and WILLIAM BOYLES, for appellant.—By the general maritime law, a preference is given to the laborers and crew, over other creditors.—3 Kent's Com. 197; Abbott on Shipping, 793, § 2; Flanders on Shipping, 325-6; 1 Newb. Adm. 183, 216-18; 3 Sumner, 57, 308; 2 Blatchf. 427; Ware's R. 134, 330. This preference was recognized and protected in this State by former legislation, and is continued in force by the Code.—Clay's Digest, 139, § 25; Session Acts 1847-8, p. 127; Code, § 2692.

P. HAMILTON, *contra*.

A. J. WALKER, C. J.—Section 2692 of the Code is in

the following words: "A lien is hereby created on all ships, vessels, steamboats, and other registered, enrolled or licensed water-craft, built, repaired, fitted, furnished or victualled within this State, for all debts contracted by the master, owner, or consignees thereof, for work done, or materials supplied, by any person within this State, for or concerning the building, repairing, fitting, furnishing, equipping, supplying, or victualing such ship, vessel, steamboat, or water-craft, and for the wages of the officers, laborers, and crew, *in preference to other debts due and owing from the owners thereof*; which lien may be asserted in the manner following." It is obvious that this statute declares a lien in favor of two classes of debts, contracted by the master, owner, or consignees of a vessel. It is contended for the appellant, that the words "in preference to other debts due and owing from the owners thereof," refer to the latter class of debts alone; that all other debts, embracing those described in the former class, are postponed to the latter; and that, therefore, the creditors in this case who belong to the latter class, have a prior right of satisfaction over the former class. We do not think the structure of the sentence permits such a construction. The "other debts," over which a preference is given, are debts "other" than those mentioned in the section; and the expression, "in preference to other debts due and owing from the owners thereof," has relation to all the debts "contracted by the master, owner, or consignees," and to which a lien is by the section given. The distinction which the statute draws, is between the debts which have a lien, and the other debts of the owner,

We find nothing in the previous legislation upon the subject in this State, which, in our judgment, would justify a different construction of the law.

The provisions found in sections 2696 and 2697 of the Code, for the joinder by the different creditors to whom a lien is given, and for the consolidation of their libels, contribute to support our construction of the statute.

Seamen have a lien, which is recognized at common law,

and which is preferred to all other demands.—3 Kent's Com., m. p. 197. It is contended, therefore, that the wages of the crew ought to be preferred to the other debts for which a lien is provided by the statute. We cannot concur in that view of the lien. The liens in this case are all alike derived from the statute, and are enforced in a summary manner prescribed by the statute. The statute makes no discrimination among them, and we think they were all properly permitted to share *pro rata* in the fund produced by the sale of the vessel.

Affirmed.

WILLIAMS vs. HATCH.

[BILL IN EQUITY FOR REFORMATION OF MORTGAGE.]

1. *Notice of mistake to creditor or purchaser.*—To authorize the reformation of a mortgage, as against a purchaser at execution sale against the mortgagor, so as to make it include a slave whose name was omitted by mistake, notice of the mistake before or at the sale is sufficient.
2. *Adverse possession between mortgagee and purchaser at execution sale against mortgagor.*—The possession of a slave by a purchaser at sheriff's sale, under execution against the mortgagor, is not adverse to the mortgagee, so far as to invalidate a subsequent sale under the mortgage.
3. *Foreclosure of mortgage under power of sale; waiver of cash payment.*—A provision in a mortgage that the property shall be sold for cash, being intended for the benefit of the mortgagee, may be waived by him; and if he delivers the property to the purchaser at the sale, without requiring payment, he thereby waives the condition, and the sale vests in the purchaser all the title conveyed by the mortgage.
4. *Rescission of sale by agreement between mortgagee and purchaser.*—A rescission of the sale under the power contained in the mortgage, by agreement between the mortgagee and purchaser, does not annul the foreclosure effected by the sale, nor reinvest the mortgagee with his original rights under the mortgage, so as to enable him to maintain a suit in equity for the reformation of the mortgage.
5. *Variance.*—Where the complainant files his bill in the character of mortgagee, asking the correction of a mistake in the mortgage; while the proof shows that the mortgage has been foreclosed under a power

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of sale, and that the complainant has since acquired the interest of the purchaser at the sale,—the variance between the allegations and proof is fatal.

APPEAL from the Chancery Court of Choctaw.

Heard before the Hon. M. J. SAFFOLD.

THE bill in this case was filed by Alfred Hatch, against Stephen Smith, Wheaton Williams, William Horn, and William P. Webb; and sought the reformation of a mortgage, executed by said Smith to the complainant, so as to make it include a slave, who was alleged to have been omitted by mistake, and was afterwards sold under executions issued on judgments against said Smith, in favor of the defendants Williams and Webb, and was purchased at the sale by Williams and Horn. The alleged mistake in the mortgage was admitted by the defendant Smith; but Williams and Horn required proof of it, and alleged that they they had no notice of it before their purchase. The defendant Webb disclaimed all interest in the suit. On final hearing, on pleadings and proof, the chancellor held, that the complainant was entitled to relief; and he therefore decreed a reformation of the mortgage, ordered the slave to be delivered up to the complainant, and directed an account to be taken of the amount due on the mortgage debt, and the hire and profits with which the defendants Williams and Horn were chargeable during their possession of the slave. From this decree the defendant Williams now appeals, and here assigns the same as error.

MANNING & WALKER, and T. B. WETMORE, for appellant.
GEO. F. SMITH, *contra*.

R. W. WALKER, J.—On the 30th of March, 1852, Smith executed to Hatch a mortgage, for the purpose of securing a sum of money lent by the latter to the former. The intention of the parties was, that the mortgage should embrace a negro woman Phillis, and her two children, Cicero and Margaret; but, by mistake, the name of Emily

was inserted instead of Margaret, and the mortgage was so recorded. In March, 1855, two judgments, one in favor of Horn, and the other of Webb, were rendered against Smith; and, by virtue of executions issued upon these judgments, the girl Margaret was levied upon, and sold to the defendants Williams and Horn. The complainant alleges, that the mistake in the mortgage was not discovered by him until the levy of the executions upon Margaret; and the evidence tends to show that notice was given to the purchasers, before the sale, that Hatch claimed Margaret under the mortgage referred to, and would sue the purchaser. Shortly afterwards, with the view of having Margaret sold under the mortgage, Hatch filed this bill to correct the mistake, and recover the girl, who had passed into the possession of the purchasers at the sheriff's sale. Pending this suit, Hatch, having first given the notice required by the mortgage, took possession of Phillis and Cicero, and sold them under the mortgage, together with the girl Margaret, who, however, was not present at the sale, being still in the possession of Williams. At this sale, Pitts became the purchaser, at the price of \$1500. By the terms of the mortgage, the property was to be sold for cash. It does not appear that Pitts paid any part of the amount bid by him; but the evidence tends to show that there was some arrangement between Hatch and Pitts, to the effect that, if Pitts could get the negroes, he would become responsible to Hatch for the amount of the mortgage debt then due, and that "Hatch would wait on Pitts till he could pay him." It further appears, that Phillis and Cicero went into the possession of Pitts after the mortgage sale, and so remained for some three months, about which time the woman Phillis died, whereupon the boy Cicero was returned to Hatch.

[1.] The equity of complainant's bill is sustained by our previous decisions, notwithstanding there is no allegation that the judgment creditors had notice of the mistake before the issuance of their executions. As against the purchasers at execution sale, notice of the mistake before or at

the sale was sufficient.—*Stone v. Hale*, 17 Ala. 557; *Whitehead v. Brown*, 18 Ala. 682; *Pierce v. Brassfield*, 9 Ala. 573; *Herbert v. Hanrick*, 16 Ala. 581.

The bill alleges, that the mortgage was given to secure the payment of \$2,000 lent by Hatch to Smith; but the proof shows, that the sum actually lent was but \$1500, and that the mortgage was accepted as a security for the latter amount. We need not, however, determine whether this was a fatal variance.

Various questions are raised as to the validity of the mortgage, the laches of the complainant in seeking its reformation, and the sufficiency of the notice of the mistake to the purchasers at the execution sale. Into these questions we need not go; for, assuming that they should all be decided in favor of the complainant, there will still remain a fatal objection to his recovery, upon the case as now presented.

[2.] The fact that, when the three slaves were sold by the mortgagee, Margaret was not produced, but was in the possession of Williams, the purchaser at the sale under execution against the mortgagor, did not, of itself, render the sale of the said girl under the mortgage invalid as to Williams. The possession of Williams was not adverse to the mortgagee, in such a sense as to avoid, so far as the former was concerned, the sale made by the latter.—*Foster v. Goree*, 5 Ala. 424; *Wiswall v. Ross*, 4 Porter, 326; *Echols v. Derrick*, 2 Stew. 144; *Boyd v. Beck*, 29 Ala. 714; *Herbert v. Hanrick*, 16 Ala. 581.

[3.] The three slaves, the woman and her two children, were sold "in the lump," for an entire price; and the mortgagee delivered the two that were under his control to the purchaser, who retained possession of them for several months. The provision in the mortgage that the property should be sold for cash, was for the benefit of Hatch; and he had the right to waive it, and sell, at his own risk, on credit. There is, as we have observed, evidence indicating an agreement between Hatch and Pitts, at the time of the sale, that the former "would wait on the latter till

he could pay him." But, even if there was no such agreement, and the property was sold for cash, as provided in the mortgage, still it was in the power of Hatch to dispense with that condition; and we must hold that he did waive it, by his voluntary and absolute delivery of all of the property that was in his power, to Pitts, without demanding payment. By this actual delivery without payment, the property in all the slaves passed to Pitts, as completely as if he had paid the price.—*White v. Adkins*, 18 Ala. 636.

We need not determine whether the sale was not attended by circumstances for which it would have been set aside, on the seasonable application of the mortgagor, or of the purchaser at sheriff's sale of his equity of redemption. Certainly, the mortgagee, himself the author of these irregularities, cannot claim that the sale should be disregarded on account of them. Neither the mortgagor, nor Williams, the purchaser at execution sale, has applied to set aside the mortgage sale. The latter, in his cross-bill, alleges the sale, and some of the circumstances attending it; and seems to rely upon them, as furnishing evidence of the invalidity of the mortgage; but he does not ask to have it set aside. Under these circumstances, and upon the pleadings before us, the sale made by the mortgagee cannot be disregarded, but must be held to vest in the purchaser all the title conveyed by the mortgage.—*Cheek Waldrum*, 25 Ala. 152; *Foster v. Goree*, 5 Ala. 424; *Benham v. Rowe*, 2 Cal.; *Edmundson v. Welsh*, 27 Ala. 578.

[4.] The alleged subsequent rescission of the sale, by agreement between the mortgagee and the purchaser, could not have the effect of annulling the foreclosure effected by the sale. That would be to put the mortgagor, and the persons succeeding to his rights, at the mercy of the mortgagee and the purchaser from him. Consequently, this subsequent rescission, the cause of which was, probably, the death of the woman Phillis, rather than Pitts' inability to pay, could not do more than transfer to Hatch, as a purchaser, the title which Pitts acquired under the mortgage

sale. It could not reinvest Hatch with his former rights or title as *mortgagee*; and therefore he cannot recover the property as mortgagee. It is equally clear that, after a mortgage has been foreclosed, the mortgagee cannot, in his character of mortgagee, sustain a bill to correct a mistake in the mortgage.

[5.] Upon the pleadings as they now stand, the only title which the complainant sets up is his title as mortgagee. The sale made by him under the power contained in the mortgage, and the subsequent rescission of the sale, (assuming that the evidence establishes such a rescission,) occurred after the filing of the original bill, and were not made the subject of an amended or supplemental bill. The case, then, is simply this: The only title which the complainant alleges, is a title as mortgagee, and the only relief he seeks is in his character as mortgagee; but the proof shows that he has parted with his title as mortgagee, and that, if he has any right to relief at all, it is in the distinct character of purchaser of the mortgage title. This variance between the allegations and the proof is fatal to the complainant's case in its present form.

Decree reversed, and cause remanded.

PORTER vs. BURLESON & DAVIS.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *When judgment final may be rendered without jury.*—In an action on an open account for goods sold and delivered, and to recover money paid by plaintiff for defendant, the court is not authorized to render judgment final by default, or *nil dicit*, without the intervention of a jury.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. S. D. HALE.

THE complaint in this case, and the judgment of the court, are as follows :

"The plaintiffs, as late partners in trade under the firm name of Burleson & Davis, claim of the defendant \$485 02, due from him by account on the 1st January, 1857; also, the like sum, for goods, wares and merchandize, sold by plaintiff to defendant in the year 1856, and due on the 1st January, 1857; and the like sum for money paid by plaintiffs for defendant. and at his request; which sums of money, with the interest thereon, are now due."

"Came the parties, by their attorneys; and the defendant now withdraws his plea by him heretofore pleaded, and now says nothing in his defense. It is therefore considered by the court, that the plaintiffs have and recover judgment against the said defendant, for the sum of \$482 83 damages, together with their costs in this behalf expended."

It is now assigned as error, that the court had no authority to render judgment final without the intervention of a jury.

B. F. PORTER, for appellant.

A. J. WALKER, C. J.—The action in this case was not "founded on any instrument of writing ascertaining the plaintiff's demand." The rendering of a judgment final, without the intervention of a jury, was not authorized by the statute; and, upon a principle repeatedly announced in this court, such action on the part of the court below was erroneous.—Code, § 2366, *Moreland v. Ruffin*, Minor, 18; *Philips v. Malone*, *ib.* 110; *Byrne v. Harris*, *ib.* 286; *Petigrew v. Petigrew*, 1 Stew. 850; *Chapman v. Arrington*, 3 Stew. 480; *Kennon v. McRae*, 3 St. & P. 249; *Amason v. Nash*, 24 Ala. 279; *Beville v. Reese*, 25 Ala. 451; *Connolly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373.

Reversed and remanded.

KNOX vs. EASTON.

[EJECTMENT.]

1. *Conclusiveness and effect of judgment by consent in ejectment.*—Where a verdict is rendered, by consent, for the plaintiff in ejectment, for the several lots sued for; and the value of each lot, and of the improvements erected thereon by the defendants, is separately assessed; and, on the plaintiffs' declining to pay for the assessed value of the improvements, a judgment is rendered, requiring each defendant to pay to the plaintiff the assessed value of his lot, and declaring that, "on the payment of the said sums respectively, the defendants shall retain the possession of the premises, free and discharged from recovery by said plaintiff, and from all claims and actions whatever for the recovery of title or possession of said premises, and from all such claims by them and all claiming under them, then said payment shall be a bar,"—such judgment, and payment made according to its terms, divests the plaintiffs' title to the land, as between the parties to the suit and their privies, and transfers to the defendants such title as will support an ejectment; and a tenant who was in possession of a part of the premises, and was served with process in the suit, and who attorned to a purchaser from his landlord pending the suit, and whose new landlord was made a party defendant to the suit, is estopped, as against his new landlord, from denying the effect of the judgment.
2. *Error without injury in charge asserting incorrect legal proposition.*—A charge to the jury, which, though incorrect as a general legal proposition, is correct in the particular case when construed in connection with the evidence, is no ground of reversal.
3. *Attornment of tenant to mortgagee or purchaser.*—As against all persons except the mortgagee and those claiming under him, the mortgagor is considered the owner of the land, so long as he remains in possession: and if the mortgagee does not disturb the possession of the mortgagor's tenant, nor otherwise assert his rights under the mortgage, an attornment by the tenant to a subsequent purchaser from the mortgagor is valid and effectual as between themselves.
4. *Abstract charge.*—There is no error in refusing to give an abstract charge.
5. *Purchase of outstanding title by mortgagor's vendee.*—If a purchaser from the mortgagor, subsequent to the execution of the mortgage, buys in a paramount title outstanding in a third person, the purchase does not enure to the benefit of the mortgagee, nor operate as a confirmation of his title.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by William C. Easton, against Dean Knox, to recover the possession of a city lot in Mobile, and was commenced on the 31st October, 1854. The lot in controversy was described in the declaration as "commencing at a point on the west side of St. Emanuel street, distant sixty feet southwardly from the south-west corner or intersection of St. Emanuel and Conti streets; thence running southwardly, along the west side of St. Emanuel street, ninety feet; thence running westwardly, and parallel with Conti street, one hundred and fifty feet; thence running northwardly, parallel to St. Emanuel street, one hundred and fifty feet, to the south side of Conti street; thence running eastwardly, along the south side of Conti street, fifty feet; thence running southwardly, and parallel with St. Emanuel street, sixty feet; and thence running eastwardly, parallel with Conti street, to the place of beginning." The material facts of the case are thus stated by Mr. Justice R. W. WALKER, in delivering the opinion of the court.

"In 1835, M. D. Eslava purchased from Victor Gannard all the land embraced in the following diagram :"

(For diagram, see next page.)

"In 1836, he divided part of it into three lots, each having a front of thirty feet on St. Emanuel street, and running back one hundred and fifteen feet; and sold and conveyed the same to S. V. Schuyler, who executed separate mortgages on the lots to secure the purchase-money. Schuyler having failed to make payment, the mortgages were foreclosed by Eslava in 1838, and the lots sold under the decrees of foreclosure, in April, 1839. At this sale, Bozereau bought the lot at the corner of Conti and St. Emanuel streets; James Johnson bought the lot immediately south of the Bozereau lot, and Eslava bought the next or third lot; and the purchasers went into possession of their respective lots under deeds from the master in chancery.

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Conti street.			
F. Collins' lot.		115 ft. Lot No. 1. Bozereau.	30 ft.
		115 ft. Lot. No. 2. James Johnson.	30 ft.
		115 ft. ----- Lot No. 3. Eslava.	30 ft.
			Old fence.
		Lot No. 4.	St. Emanuel Street.
		Nannette Rochon's lot.	

"In 1847, the second (or Johnson) lot was sold under execution against the said James Johnson, and was bid off by his son, George W. Johnson, who received the sheriff's deed; and the lot was described in the sheriff's deed as being thirty-six feet front, by sixty-eight feet deep. It appears, however, that there was no change of possession in consequence of the sheriff's sale. George W. Johnson died, without issue, in 1850, leaving all his property, real and personal, to his wife, Glorvina Johnson. James Johnson died in 1851, leaving a will, by which, after making some special bequests, he left all the residue of his estate, real and personal, to his wife, Elizabeth Johnson, and his daughter-in-law, Glorvina Johnson, the widow of his son, George W. Johnson. Henry Chamberlain was appointed and qualified as his executor. Glorvina Johnson, the widow of George W., afterwards intermar-

ried with John S. Rush; and Rush and his wife, on the 22d February, 1854, sold and conveyed the second (or Johnson) lot to Dean Knox, the defendant. Their deed describes the lot as fronting thirty-six feet on St. Emanuel street, and having a depth of one hundred and thirty-four feet; but the warranty only extends to a front of thirty feet.

“It is conceded by the counsel for the appellee, that Knox has a good title, as against the appellee, to this second (or Johnson) lot, to the extent of 30 feet front, measured from the south side of the Bozereau lot, with a depth of one hundred and fifteen feet. The contest, so far as this lot is concerned, is as to the space of ground, some six feet wide, lying between the south side of the Johnson lot, as laid down in the diagram, and the old fence, the line of which is also designated. The Bozereau lot is not involved in the controversy.

“In 1850, the title of Eslava, and of all persons holding under him, to all the lots embraced in the diagram, was disputed by the heirs of Mrs. Gannard (Elizabeth Chastang). They claimed that her husband, Victor Gannard, had sold the land to Eslava, holding it under the will of his wife; that she, being a married woman, could not devise; and that consequently the land had descended to them as her heirs. That the devise was void, was decided by this court in *Baker v. Chastang*, 18 Ala. 417.

“On the 14th November, 1850, the heirs brought ejectment for all the lands embraced in the diagram, and served the declaration on Berg and Dean Knox, the present defendant, as the tenants in possession. The evidence conduced to show that, when the suit was commenced by the heirs of Chastang, all of the land sued for, not embraced in the Bozereau and Johnson lots, allowing to each of these a front of thirty feet and a depth of one hundred and fifteen feet, except the narrow strip which lies between the old fence and the south side of the Johnson lot as laid down in the diagram, was in the possession of Knox, who held the same as tenant at will of Eslava; that Eslava

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employed Stewart & Easton to defend the suit; that, finding that his title could not be sustained against the claim of Chastang's heirs, Eslava relinquished his possession of the property to Stewart & Easton, who had acquired the title conveyed by Eslava, by some of the mortgages which he had executed before the ejectment suit was begun; and that Stewart & Easton became defendants to said suit, as landlords of Knox, in lieu of Eslava. The record of that suit shows, that Stewart and Easton did make themselves defendants thereto, May 29, 1852.

"The exhibits, which form a part of the bill of exceptions, show that, on the 27th January, 1850, Eslava sold and conveyed to Isaac Bell, jr., as trustee, the lot 'on the west side of St. Emanuel street, between Conti and Government street, measuring sixty feet front on St. Emanuel, and having a depth of one hundred and thirty feet, bounded on the east by St. Emanuel street, on the west by property of Faustin Collins and Joseph Slett, north by property of person or persons unknown to grantor, and south by the property of N. Rochon.' They also show, that Bell, by deed dated November 17, 1851, sold and conveyed to Taylor, describing the lot as having a front of ninety feet, with a depth of one hundred and thirty feet, more or less, and as bounded east by Emanuel street, north by Johnson's property, west by Collins', and south by Rochon's; and that Taylor sold and conveyed to Stewart and Easton, by deed dated June 2d, 1852, the property being described as in the deed from Bell to Taylor.

"The record of the Chastang suit does not show any proceedings therein, after its institution, until May 29th, 1852. At that time, Bozereau, Chamberlain, executor of James Johnson, and Stewart and Easton, appeared and made themselves parties defendant, as landlords of the tenants in possession. Bozereau claimed the lot at the corner of Conti and St. Emanuel streets, thirty feet front, and one hundred and fifteen feet deep; Chamberlain, executor of Johnson, claimed the lot immediately south of, and having the same dimensions as the Bozereau lot; and Stewart and

Easton claimed all the remainder of the premises sued for. By consent, a verdict was rendered in favor of plaintiffs, for the land; and the value of each lot, and of the improvements thereon, was separately assessed. The Bozereau lot was valued at \$1425; the Johnson lot at \$400; and the remainder, claimed by Stewart and Easton, at \$1200. The plaintiffs in ejectment declined to pay for the improvements, as assessed by the jury; and a judgment was rendered, requiring the defendants respectively to pay to the plaintiffs the value of the lots claimed by them, and declaring that, 'on the payment of said sums respectively, the defendants shall retain the possession of the premises, free and discharged from recovery by said plaintiffs, and from all claims and actions whatsoever for the recovery of title or possession of said premises, and from all such claims by them and all claims under them, then said payment shall be a bar.' It was proved that the defendants paid the judgments thus rendered against them; and on the 14th October, 1854, Stewart released to Easton all his interest in the premises claimed by them. Easton now claims all the land embraced in this diagram that is not included in the Bozereau and Johnson lots, allowing to each of these lots a front of thirty, and a depth of one hundred and fifteen feet.

"The claim of Knox to the strip of ground six or seven feet wide, lying between the south line of the Johnson lot and the old fence; is founded on the deed from Rush and wife, before mentioned. His claim to the remainder of the land sued for, rests mainly upon his purchase of the premises at a master's sale, on the 2d April, 1855, which was after the commencement of this suit. This sale was made under a decree foreclosing a mortgage, executed by Eslava to Cruzat on 14th February, 1858. The bill to foreclose was filed in September, 1851, and the decree rendered January 30th, 1855. Knox also claims under a quit-claim deed from some of the heirs of Chastang, executed on the 2d June, 1855."

The court charged the jury as follows:

“1. If Mrs. Gannard was a married woman when she made her will in favor of her husband, that devise would be void, as she had no power to devise by law; that consequently, if Gannard had no other title to convey to Eslava than that acquired by such devise, his deed would not convey a good title as against the heirs of Mrs. Gannard, and the title of said heirs would be better than that of said Gannard.

“2. That the effect of the agreement and judgment, shown by the record of the ejectment suit, in which the heirs of Chastang were plaintiffs, and Stewart & Easton and others were defendants, if payment was made according to the agreement contained in the record, was to divest the heirs of Chastang of such title as they then had to the lands in controversy, and to transfer to the defendants, if the possession was with them, such an interest therein as would support an action of ejectment.

“3. That if Chamberlain, at the time of the suit by Chastang's heirs, was in full possession of one of the lots in controversy, as agent for the estate of James Johnson, or for that of George Johnson, and was acting in reference to such lot for the benefit of either estate, or for that which had a better right to such lot, without a definite understanding as to the relative rights of the two estates in respect to it; and if, being so in possession, he made himself a party to the suit as executor of the estate of James Johnson, without instructions from any one so to make himself a party,—yet the effect of the judgment and agreement in the case, and of payment pursuant to such agreement, would be, as against Chastang's heirs, to transfer to him their title to the lot he was so in possession of and defending; but, as between the estates of James Johnson and George Johnson, the agency of Chamberlain would enure to the benefit of that which had the better right.

“4. That if they believed the defendant Knox was the tenant of Eslava as to a part of the land in controversy, and that Stewart & Easton were substituted to the possession of Eslava as to such part, then, until he had surren-

dered the possession to Eslava, or to those substituted to his possession, he could not resist the claim for possession on the part of Eslava, or of those substituted to his possession by force of the deeds which he exhibited, either from the register in chancery, or from the heirs of Mrs. Gannard.

"5. That the Spanish concession, and the confirmation of the same by the United States, and the location thereof in favor of Mrs. Chastang (Gannard), gave her a complete title; and if the six or seven feet excess over the thirty feet of the Johnson lot were included in said concession and confirmation in favor of Mrs. Gannard, or in those having such her title, (?) would be paramount to a title to such excess derived from her husband, if the only title he had was acquired by virtue of the devise to him by his wife."

The defendant excepted to each of these charges, and then requested the court to give the following charges:

"1. That if the jury believed, from the evidence, that George W. Johnson, and those under whom he claimed, had been in quiet, peaceable, and uninterrupted possession of said lot, for more than twenty years before the commencement of the suit by the heirs of Chastang, claiming title to it, then they had a perfect title as against said heirs; and the fact that Chamberlain, as the executor of James Johnson, made himself a party as the executor of a person who had no title or claim to the land, did not divest his title, and the plaintiff could not recover as to that portion of the land claimed in the declaration in ejectment.

"2. That if they believed, from the testimony, that the defendant (?) and claimed to hold the ninety feet adversely to all persons claiming title to it at the time Eslava made the parol transfer to Stewart and Easton, such transfer passed no right to the possession as against the defendant.

"3. That when Eslava mortgaged the land to Cruzat and another, if Knox was at the time the tenant of Eslava, he became the tenant of the mortgagee; and that if he afterwards purchased the title under which he entered, he had a right to dispute the title of the plaintiff.

"4. That, from the evidence, Knox was never the tenant of Stewart & Easton, nor of W. C. Easton.

"5. That if Stewart & Easton, and the other parties defendant, defended the suit of Chastang's heirs upon the title of Eslava, and upon no other title, then the judgment or agreement, entered by consent, was a confirmation of the title of Eslava and those claiming under it, and the plaintiff is estopped from denying his title."

The court refused each of these charges, and the defendant excepted to their refusal; and he now assigns as error the charges given, the refusal of the several charges asked, and the rulings of the court on the evidence to which exceptions were reserved.

R. H. SMITH, and Wm. BOYLES, for appellant.

GEO. N. STEWART, *contra*.

R. W. WALKER, J.—(After stating the facts as above copied.) The questions to be tried in the court below, were—1st, who had the best right of possession of the slip of six or seven feet north of the old fence; and, 2d, who had the best right of possession of the remainder of the land sued for. We shall not attempt to answer these questions, but will confine ourselves to an examination of the several charges given and refused. To the first and fifth charges given, no objection has been made in the arguments submitted on behalf of the appellant.

[1.] The obvious meaning of the second charge was, that the effect of the agreement and judgment in the Chastang suit, if payment was made according to the agreement, was to divest the heirs of Chastang of title to the lands in controversy, and to transfer to Stewart & Easton such an interest in the parcels claimed by them in that suit, as would enable them to maintain ejectment; provided that, at the time of the recovery and agreement, the possession was with Stewart & Easton.

While it may be admitted, that the judgment in the Chastang suit, followed by the required payment by

Stewart & Easton, did not, as against persons not parties or privies to the record, operate a conveyance of the title of Chastang's heirs to Stewart & Easton, it cannot be doubted, that all persons belonging to either of these classes are estopped by the record from denying that, by such judgment and payment, Stewart & Easton did acquire the title of Chastang's heirs, to the parcels claimed by them. The record of that suit shows, that Knox was served with the declaration and the usual notice from the casual ejector. This was sufficient to bring him into court, and might, perhaps, justify us in holding him bound by the estoppel of the judgment, although he did not come in and make himself defendant to the action.—*Cruise v. Riddle*, 21 Ala. 791; 2 Phill. Ev. (C. & H's Notes, Edwards' ed. 1859,) p. 8, note 253, p. 11-42, note 270; 3 *ib.* 625; *Shumake v. Nelms*, 25 Ala. 135.

But we need not rest our decision on this single ground. The evidence is all set out; and the charge we are considering, as well as all the others, must be construed in connection with the evidence. The evidence tended to show that, when the Chastang suit was begun, Knox was in possession, as the tenant of Eslava, of the whole of lot number four, and all that part of lot number three, which lies south of the old place; that pending the suit, Eslava transferred his possession to Stewart & Easton; that, by his consent and direction, Knox attorned to Stewart & Easton, who made themselves defendants to the action as landlords of Knox; and that matters stood thus when the judgment in the ejectment suit was rendered. The evidence that Knox, being already in possession, attorned to them, and became their tenant, is the only evidence that was offered, tending to show that Stewart & Easton were, at the time of the recovery, in possession of the land claimed by them. Unless, therefore, Knox was their tenant, they were not in possession at all, and they were only in possession to the extent to which he was their tenant. In effect, then, the charge was that, if, at the time of the recovery, Knox was in possession as the tenant

of Stewart & Easton, the agreement and recovery, and payment in pursuance thereof, operated a divestiture of the Chastang title, and a transfer to Stewart & Easton of such an interest in the land which Knox held as their tenant, as would enable them to maintain ejectment.

As we have seen, the record of the Chastang suit shows that Knox was served with the declaration and notice, and that Stewart & Easton made themselves defendants to the action. Now, if, in addition, it was proved that, pending the suit, Knox became the tenant of Stewart & Easton, and so remained until the recovery, it cannot be doubted, we think, that he is bound by the judgment, so far as it relates to the land of which he was in possession as the tenant of Stewart & Easton, and is thereby estopped from denying that, as to that land, the recovery and payment did effect a divestiture of the title of the Chastang heirs, and the transfer to Stewart & Easton of such an interest as would support an ejectment.—See 2 Phill. Ev. (C. & H's Notes, Edward's ed. 1859,) p. 15, note 260; *ib.* p. 19, note 261; *Jackson v. Stone*, 13 Johns. 447; *Shumake v. Nelms*, 25 Ala. 126 (135); *Howard v. Kennedy*, 4 Ala. 592.

[2.] The court did not decide that Stewart & Easton were in possession, but left that question to the jury, and instructed them that the effect of the recovery, as the foundation of a right to maintain ejectment, would depend upon their being in possession. As the only possession they attempted to prove was the possession of Knox as their tenant, it follows that the appellant cannot have been injured by the second charge. A charge which is correct in the particular case, though incorrect as a general legal proposition, is not a ground for reversal. There can be no doubt that, when the action of ejectment was brought by the heirs of Chastang, they had the legal title to all of this property.—*Baker v. Chastang*, 18 Ala. 417.

As no part of the lot to which the *third* charge relates was in controversy here, the defendant could not have been injured by it.

[3.] The fourth charge given, and the third and fourth

charges refused, can best be considered together. Knox, as already noticed, was served with the declaration in the Chastang suit; and we have seen, that, if, in addition to this, it was proved that he was the tenant of Stewart & Easton, who made themselves defendants to the action, he is estopped from denying that, as to the land held by him as their tenant, they have been invested with the paramount title of the Chastang heirs. Hence, if there was error in the fourth charge, it was error without injury. It is said, however, that notwithstanding the attornment of Knox to Stewart & Easton, (which the evidence tended to establish,) he was not, in legal judgment, their tenant; that when Eslava, in 1848, mortgaged the property to Cruzat, Knox became, by operation of law, the tenant of Cruzat, the mortgagee; and that the subsequent attornment to Stewart & Easton, who derived title under a mortgage younger than Cruzat's, had no consideration to support it, and was void. But, as against all persons, except the mortgagee and those claiming under him, the mortgagor is considered as owner of the land, so long as he remains in possession of it; and subject to the lien of the mortgage, the legal rights and remedies of others may be sought, asserted, and enforced, in the same manner as if no such mortgage existed.—*Doe v. McLoskey*, 1 Ala. 708; Coote on Mortgages, 322-7, and notes. Accordingly, the mortgagor in possession may hire or lease the mortgaged property, and receive the rents and profits, until the mortgagee gives notice to the tenant not to pay to the mortgagor.—*Hutchinson v. Dearing*, 20 Ala. 802; *Mansony v. United States Bank*, 4 Ala. 735; *Branch Bank v. Fry*, 23 Ala. 773. There was no evidence that Cruzat ever entered, or demanded possession of Eslava or his vendees, or in any manner asserted against the latter his rights under the mortgage. The mortgagor and his vendees being thus left in undisturbed possession, the attornment of Knox to Stewart & Easton was valid and effectual.

[4.] There was no evidence to sustain the first and second charges asked by the defendant. Being abstract, the court did not err in refusing to give them.

[5.] We cannot assent to the proposition involved in the fifth charge asked,—that when the vendee of a mortgagor purchases in the paramount outstanding title of a third person, the purchase enures to the benefit of the mortgagee, and operates as a confirmation of his title.

It is very properly conceded by the counsel for the appellee, that the plaintiff has no right to recover any part of the Johnson lot, allowing to the same a front of thirty, and a depth of one hundred and fifteen feet. It appears, however, that the verdict and judgment embrace a part of this lot; for the recovery is for all the land west of one hundred feet from St. Emanuel street; in other words, the recovery includes fifteen feet from the west side of the Johnson lot, to which the plaintiff has no claim. But this matter is not involved in any of the exceptions brought before us; and as the plaintiff expresses a willingness to enter a *remititur* as to this part of the recovery whenever called upon, it is not likely that the mistake will injure the defendant.

Judgment affirmed.

GORDON vs. CLAPP.

[ACTION FOR WORK AND LABOR DONE.]

1. *Admissibility of party's declarations as evidence for him.*—In an action against an administrator, seeking to charge him individually for work and labor done on a house belonging to his intestate's estate, of which he had actual possession at the time the work was done; plaintiff having proved that defendant superintended, approved, and accepted the work, and defendant having adduced evidence of a contract between plaintiff and the decedent for the performance of the work,—plaintiff cannot be allowed to prove that, “when about to commence the work, defendant not being present,” he said to a witness with whom, as agent of the decedent, he had made the former contract, “that he would not do the work under the former contract, but looked to the defendant individually for payment.”

APPEAL from the County Court of Montgomery.

Tried before the Hon. DAVID CAMPBELL.

THIS action was brought by Charles A. Clapp, against John W. Gordon, to recover the sum of \$604, alleged to be "due on account between plaintiff and defendant on the 1st January, 1860, and for work and labor done, and materials furnished, by plaintiff for defendant." On the trial, as the bill of exceptions states, the plaintiff proved the performance of the work for which compensation was claimed; and the defendant, having introduced evidence tending to show that the work was done on a house which belonged to one Barnard in his life-time, but was in the possession of the defendant as his administrator at the time the work was performed, proved by one W. T. Robinson, a witness, that he (Robinson) was authorized by said Barnard to make a contract for the performance of the work in question; that said plaintiff, on being informed of his authority to act for Barnard, authorized him to make the following proposal in writing for the performance of the work; that said proposal was accepted by Barnard, and its acceptance was communicated to plaintiff by witness." (The proposal, as set out in the record, is addressed to Barnard, signed "C. A. Clapp, *per* W. T. Robinson," and specifies the price at which the designated work will be done.) "Plaintiff then offered to prove by said Robinson, that when about to commence the work, defendant not being present, he told the witness, that he would not do the work under the contract with Barnard, but that he looked to defendant individually for payment. The defendant objected to this evidence, but the court overruled his objection, and admitted the evidence; to which the defendant excepted. Plaintiff had proved, before said evidence was offered, that defendant had actual possession of the house before the work was commenced, and while it was being performed; that he superintended, approved, and accepted the work; and that he had paid out of his individual means for other work done on the house about the same time." The ad-

mission of the evidence objected to is the only matter now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—We are not informed on what principle the plaintiff was permitted to prove his own declaration, made in the absence of the defendant, to the effect “that he would not do the work under the contract with Barnard, but that he looked to the defendant individually for his pay.” The general rule is, that a party’s *ex-parte* statements cannot become evidence for himself. To that rule there are exceptions, one of which is, that what a party says, contemporaneously with an act done, and explanatory of its nature, may be given in evidence as part of the *res gestæ*. To bring a case within this rule, the declaration must be so connected with the fact it is sought to explain as to illustrate its character.—1 Greenl. Ev. § 108. In the present case, the declaration was not at all explanatory of the work and labor done; and hence we hold, that the declaration formed no part of the *res gestæ*. We know of no principle of law on which it was admissible, and hold that the county court of Montgomery erred in its admission.—See *Sanford v. Howard*, 29 Ala. 684.

Reversed and remanded.

FOSTER vs. KENNEDY'S ADM'R.

[ACTION BY PURCHASER, AGAINST VENDOR OF LAND, TO RECOVER DAMAGES FOR MISREPRESENTATIONS.]

1. *Measure of damages to purchaser for misrepresentation; variance.*—In an action by the purchaser, to recover damages for a misrepresentation of the boundary lines by the vendor, in falsely stating that a mill

and mill-pond were included in the tract, the measure of damages which the plaintiff is entitled to recover, is the difference between the actual value of the land and its value on the supposition that the representation was true; but he cannot be allowed to prove what would have been the value of the land if the pond had been on a part of the tract different from that on which, according to the averments of the complaint, it was represented to be.

2. *What constitutes fraud by vendor.*—To constitute a fraud on the part of the vendor, in misrepresenting the location of the boundary lines of the land and the capacity and quality of mills situate on the lands, it is not necessary that the representations should be known by him to be false, nor that they should be made under circumstances manifesting a recklessness of truth on his part.
3. *Same.*—A representation by the vendor, as to the location of the boundary lines of the land, or as to the capacity and qualities of a mill situated thereon, cannot be declared, as matter of law, the statement of an opinion; but it is a question for the jury to decide, whether it is the statement of an opinion or a fact.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JAMES B. MARTIN.

This action was brought by John A. H. Kennedy and Evaline E. Kennedy, his wife, (and revived, on the death of Mrs. Kennedy pending the suit, in the name of her administrator,) against Charles Foster, to recover damages for a deceit in the sale of a tract of land by said Foster to Mrs. Kennedy; and was commenced on the 6th January, 1859. The land was described in the complaint as "the south-west fourth of the north-west quarter of section five, and the south-east fourth and north-east fourth of the south-east quarter of section six, in township twenty, range ten east, in the Coosa land-district." The alleged misrepresentations were—1st, "that the said defendant pointed out to the said E. E. Kennedy that the north-west corner of the said south-west fourth of the north-west quarter was located on the west side of a certain creek running through said land, called 'Fox creek,' at a point and place then and there pointed out by said defendant, and that the northern and western boundaries of said south-west fourth of the north-west quarter, running from said corner then and there pointed out by the defendant, would

include a certain mill-pond, and the land on which the water of said pond was situated, and a certain shoal situated on said creek, and a large amount of valuable land, to-wit, twenty acres, more or less, all of which was then and there pointed out by the defendant;" 2d, that a certain grist-mill, situated on the land, "was built by order of the commissioners' court of the county, did a large business, and had a large patronage, and that there was but one other grist-mill within five miles of said mill;" and, 3d, that a certain saw-mill on the land "was sound and in good repair, and, by three days' work of a mechanic, could be made to cut eight hundred feet of lumber per day."

On the trial, as appears from the bill of exceptions, "the plaintiff introduced one Clifton as a witness, who testified, that, at a previous term of this court, the defendant Foster applied for a continuance of a certain cause therein pending against him, in favor of one Joshua Hightower, and stated, that he had purchased a tract of land on Fox creek, with a mill on it, that the lines had been misrepresented to him, that he had sold the land in the same way, and that he could prove it by an absent witness." The defendant objected to this evidence; the court overruled his objection, and he excepted.

The *defendant* (?) introduced one Berryhill as a witness, who was a mill-wright and machinist, and exhibited to him a diagram, made by the county surveyor, "of the east half of the south-east fourth of section six," township twenty, range ten, "which showed that two-thirds of said mill-pond was off the said tract of land." "Plaintiff asked said witness to look on said diagram, and to give his opinion as to the difference in value between the mill-shoal and water privileges on the tract, as shown by the diagram, and the value of the same if the north boundary of the tract crossed at the head of the pond; to which the witness answered, that the value of the land was less by three hundred dollars." The defendant objected to this evidence, and reserved an exception to the overruling of his objection.

The defendant asked the court to charge the jury—

"1. That fraud will not be implied from the falsity of a representation : that it is necessary to show that the representation was made by the vendor with a knowledge of its untruth, or under circumstances manifesting a recklessness of truth on his part, without knowing whether it was true or false.

"2. That the positive representations of the vendor, as to the boundaries of the land, or as to the qualities of the machinery, would be regarded by the law as an expression of his opinion or belief, unless it was intended and received as a stipulation that the boundaries of the land, or the qualities of the machinery, were such as they were represented to be."

The court refused these charges, and the defendant excepted to their refusal; and he now assigns as error the several rulings of the court on the evidence, and the refusal of the charges asked.

HEFLIN & FORNEY, for appellant.

J. FALKNER, *contra*.

A. J. WALKER, C. J.—1. The evidence of Clifton tended to show, that the defendant misrepresented the location of the lines of the land, and did so knowingly; and it requires no argument to prove that his evidence was admissible. But, under the averments of the complaint, the evidence of the witness Berryhill was not admissible. The alleged misrepresentation was, that the mill-pond and mill were on the south-west quarter of the north-west quarter of section five, township twenty, range ten; and Berryhill was allowed to testify, that if the entire pond had been included in the tract represented in the diagram, which was the east half (or the south-east and north-east quarters) of the south-east quarter of section six, in the same township and range, the land would have been worth more by three hundred dollars. The measure of damages for the falsity of the alleged representation, was the diminution of the value in consequence of the mill and pond not being on the

land on which it was represented to be. The inquiry must be as to the injury resulting from the fact that the representation was false.—*Gibson v. Marquis*, 29 Ala. 668; *Stow v. Bozeman*, *ib.* 397; *Ward v. Reynolds*, 32 Ala. 384. A comparison is to be made, between the actual value, and the value upon the supposition of a correspondence with the representation. The comparison which the witness was permitted to make, was between the actual value, and the value upon the supposition of the pond being upon one piece of land, when the representation alleged was that it was upon another tract. The testimony was, therefore, not admissible under the complaint, and the court erred in admitting it.

[2-3.] There was no error in the refusal of the charges asked by the defendant. Neither a knowledge of the falsity of a representation, nor the presence of circumstances manifesting a recklessness of truth, is an indispensable ingredient of a fraud. "A misrepresentation by the vendor of land, in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is a fraud."—*Foster v. Gressett*, 29 Ala. 393; *Blackman v. Johnson*, 35 Ala. 252; *Kelly v. Allen*, 34 Ala. 663. The law does not pronounce representations as to the boundaries of land, or as to the qualities of machinery, to be expressions of opinion. They may be either statements of facts, or statements of opinion; and it is for the jury to decide whether they are one or the other.

The declarations of the defendant made to John A. H. Kennedy, the husband of the plaintiff's intestate, before the purchase, will probably hereafter be offered in connection with other facts, not stated in the bill of exceptions to have attended their offer on the previous trial. We therefore do not deem it necessary to pass upon the admissibility of such evidence in this case. Besides, the question of admissibility may, perhaps, be changed by an amendment of the complaint.

Reversed and remanded.

MACHEN'S EXECUTOR vs. MACHEN.

[DETINUE FOR SLAVES, BY HUSBAND'S EXECUTOR AGAINST WIFE.]

1. *Husband's marital rights.*—At common law, if personal property was given to the wife during coverture, without words creating in her a separate estate, and passed into the possession of the husband, his marital rights thereby attached; and no subsequent declarations on his part, disclaiming title in himself, and acknowledging that the property belonged to his wife, could divest his title at law, so as to enable the wife to defeat an action by his personal representative; but, if the husband disclaimed all title to the property before the title vested in him, and elected to receive and hold the property merely as trustee for the wife, and died while so holding the possession, his personal representative could not recover the property from the surviving wife, even though such disclaimer and election on his part were founded in ignorance or mistake as to his legal rights; and in case of such original disclaimer and election by the husband, his subsequent declarations, asserting title in himself, and the payment of taxes on the property as his own, though they are circumstances to which the jury may look in determining his intention in reference to the property, did not, as matter of law, operate a change of the title from the wife to himself.
2. *Separate estate of wife.*—It is settled in this State, that a valid gift of personal property, to the separate use of a married woman, may be made orally.

APPEAL from the Circuit Court of St. Clair, on change of venue from Cherokee.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by the executor of the last will and testament of James Machen, deceased, against Mrs. Jane Machen, who was the widow of said testator, to recover several slaves, with damages for their detention. The record does not show when the suit was commenced, the first minute-entry being an order for a change of venue, made at the October term, 1847. The slaves in controversy belonged to Merry Hall, deceased, at the time of his death, who was the father of Mrs. Machen; were delivered to her and her husband, or to her alone, by the executor

of said Merry Hall, in South Carolina, about the year 1827 or 1828; were brought by them to this State, where they lived at the time, on their return home; and continued in their possession, and on the plantation of said James Machen, up to the time of his death. The defendant's evidence tended to show, that the slaves were delivered by the executor to her alone, though in the presence of her husband; that the delivery was accompanied by a declaration that the property was given to her separate use, or words to that effect; and that the husband disclaimed all title to the slaves at the time of the delivery, received them as belonging to his wife, and ever afterwards treated and recognized them as hers. The plaintiff's evidence tended to show, on the contrary, that the delivery was to both husband and wife; that the testator worked the slaves on his plantation with his other hands, spoke of them as his own, included them in the list of his taxable property, and paid taxes on them. The plaintiff reserved several exceptions to the rulings of the court on the evidence; but, as none of them are noticed in the opinion of this court, it is unnecessary to give any further statement of the evidence.

The plaintiff asked the court to give the following charges to the jury:

"1. That, if the plaintiff has proved that the slaves sued for were on the plantation where the testator resided at the time of his death, and for many years previous, and that he had them employed in the usual manner about his dwelling and on the plantation, then proof of their respective values and hires, and that the defendant detained them from him at the time the suit was brought, *prima facie*, entitled him to recover said slaves, with their annual hire from the commencement of the suit.

"2. That the law of this State is, that the possession of personal property by the wife is the possession of the husband; but there may be a possession in the wife, separate and distinct from the husband, which the law recognizes and will uphold.

"3. That if the jury believe, from the evidence, that James Machen and the defendant were husband and wife, and that the slaves in controversy were delivered to her by Humphrey Hall, in the presence of her husband, while they were in South Carolina, at the time shown by the evidence, and were brought by them to their residence in this State, and remained there until the death of the husband, working on the farm and about the house,—then, in judgment of law, that was the possession of the husband.

"4. That the law declares personal property, thus held, to be the property of the husband absolutely.

"5. That the defendant, in order to defeat such absolute right on the part of her husband, must show affirmatively that the negroes were delivered to her, for her sole and separate use, with the knowledge and consent of her husband, and that at the time of such delivery, by the laws of the State where they were delivered, a separate estate in favor of a married woman, as against the marital rights of her husband, could be created by a parol gift, accompanied by a delivery of the slaves coupled with such a limitation.

"6. That, if the defendant has not shown this, then the plaintiff is entitled to recover, if the jury find that he has proved the facts stated in the first charge asked.

"7. That if the jury believe, from the evidence, that James Machen made the declarations offered in evidence, as to the slaves being 'Jenny's property', in ignorance of his rights, then they should not be allowed to divest the property out of him, or his legal representative, the plaintiff in this action, and the jury must not allow them; *provided the jury believe, from the evidence, that the marital rights of the husband attached to the slaves at the time of the gift and delivery to the defendant.*

"8. That if James Machen was ignorant of his rights to the property, and consented that his wife might receive it as her separate estate under that mistake, then he had the right, at any time before his death, to assert his claim, and hold the property as husband; and that if he did so, then the defendant cannot hold the property.

"9. That if the possession of the property was with the husband, and he conceded the right of property to his wife up to the moment of his death; this is matter of equitable concession and agreement, unless the jury believe, from the evidence, that the slaves were the sole and separate estate of the wife."

"10. If Humphrey Hall delivered the property, as a gift from his father, for defendant's sole and separate use, or as a separate estate in the wife, and there is no proof which shows that the property passed out of the father, and the evidence satisfies the jury that the father died in the possession thereof, then the delivery by Humphrey Hall, as a separate estate in the wife, is void, and the rights of the husband are not thereby affected."

The court gave the eighth charge as asked, and the second and seventh with the qualifications shown by the italics, and refused the others; to which refusals, as well as to the qualifications given, and to several affirmative charges afterwards given by the court, the plaintiff reserved exceptions, and he now assigns the same as error.

L. E. PARSONS, for appellant.

ALEX. WHITE, and B. T. POPE, *contra*.

R. W. WALKER, J.—The question arising upon the evidence in the court below was, whether the marital rights of James Machen, who was the plaintiff's testator, and the husband of the defendant, attached to the property in controversy during the coverture: "The inquiry, in every such case, is, not whether the husband had the right to reduce the property to possession as husband, but whether he actually reduced it to possession in that capacity." In the absence of a statute changing the principle of the common law, where personal property, given to a wife during coverture, without expressions in the gift creating in her a separate estate, passes into the possession of her husband, who does nothing at the time of the gift or delivery of the property to prevent his marital rights from attaching, the

title vests *eo instanti* in him, and the property becomes his absolutely. Where the title has thus vested in the husband, no subsequent declarations made by him, disclaiming title in himself, and acknowledging the property to belong to his wife, can, at law, vest the property in the wife, so as to enable her to resist successfully the action of the husband's representative; and any such declarations, founded in ignorance or mistake as to his rights, would not, even in equity, divest the property out of the husband or his representative.

But the husband may repudiate all claim, as husband, to property given to the wife, and elect to treat it as hers, and hold or control it as her trustee; and if such disclaimer and election are made before the title is vested in him, and the coverture is determined while the property is so held, his marital rights cannot be afterwards asserted by him or by his personal representative. In such case, the property vests absolutely in law in the wife, if she be the survivor, and in her administrator or personal representative, if she be the party who first dies; and it makes no difference whether the husband or wife actually controls the property. Nor is this result at all affected by the fact, that the husband's refusal to receive the property as husband, and his election to hold it for his wife, are founded in ignorance or mistake as to his legal rights; for, although his conduct may be the result of mistake, still the fact would remain, that he has not reduced the property into possession as husband. These principles are all clearly settled by our previous decisions.—*Machen v. Machen*, 15 Ala. 373; *S. C.*, 28 Ala. 374; *Jennings v. Blocker*, 25 Ala. 415; *Gillespie v. Burleson*, 28 Ala. 551; *Lockhart v. Cameron*, 29 Ala. 355.

It must be observed, that the controversy here is between the husband's executor and the widow; and we purposely leave open the question, whether, as against a creditor of the husband, property given to the wife, without words creating in her a separate estate, can be exonerated from liability, by reason of his refusal to accept the gift as hus-

band, and electing to hold the property as belonging to his wife.—See *Jennings v. Blocker*, 25 Ala. 422.

It may be true, (though it is not now necessary to decide that point,) that although, in consequence of what transpires at the time of the delivery, the marital rights of the husband do not then attach to the property, still he may afterwards, at any time during the coverture, assert his right to the property, take possession of it as husband, and thereby vest the title in himself. Assuming this to be the law, yet, if, at the time of the gift or delivery, the husband disclaims all title, and consents to treat and hold the property as his wife's separate estate, his subsequent declaration that the property was his, or that it should go to his children, or his payment of the taxes due on the same, would not constitute, as matter of law, a change in the property from his wife to himself; but such declarations and acts are circumstances to which the jury may properly look, in order to arrive at the intention of the husband in reference to the property.

The third and fourth charges asked by the plaintiff, and upon which particular stress is laid in the written argument of counsel, were properly refused. There was evidence which tended to show that, though the negroes were delivered to the wife during coverture, and continued on the husband's premises until his death, still he never received or held the possession as husband, but, on the contrary, always refused to do so. These charges might well have been understood by the jury as a denial of the husband's right thus to repudiate all claim to the property as husband, and of the validity of his election to hold it for his wife.

[2.] The fifth charge asked is in conflict with the repeated decisions of this court, that, independent of statute, a verbal oral gift of personal property may be made to the separate use of a married woman.—*Lockhart v. Cameron*, 29 Ala. 335, and cases cited.

Without examining more in detail the various charges given and refused, it is enough to say that, considering them

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in connection with the evidence disclosed by the record, we find no error in the action of the court in relation to them, of which the appellant can complain.

Judgment affirmed.

A. J. WALKER, C. J., not sitting.

ENGLAND & LEE ET AL. vs. REYNOLDS, DEVOE & CO. ET AL.

[CREDITORS' BILL FOR SETTLEMENT OF ASSIGNMENT.]

1. *Validity of assignment for benefit of creditors; assent of beneficiaries.*

An assignment, by which a debtor conveys to a trustee, for the benefit of all his creditors equally, all his property, real and personal; and which authorizes the trustee "to sell and dispose of the said real and personal estate, and to collect the said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or by private contract, and with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient so to do,"—is not vitiated by the general description of the property conveyed, nor by the failure to specify the names of the creditors, nor by the discretion given to the trustee as to the terms and mode of sale; nor is the assent of the creditors necessary to uphold the assignment against the liens of subsequent attachments.

2. *Responsiveness of answer.*—Where the bill alleges, that one of the defendants had sold a portion of the property sought to be condemned to the payment of the complainants' debts, under a pretended mortgage or lien, given by the debtor to secure a fictitious debt; and that the secured debt, if any part of it was just, was fully discharged by the proceeds of sale, leaving a balance in the defendant's hands subject to the complainants' claims,—an answer, asserting the *bona fides* of the secured debt, the validity of the mortgage, (which is made an exhibit, and which contains a power of sale,) and that the entire proceeds of the sale were not sufficient to satisfy the secured debt, is responsive.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES C. CLARK.

THE bill in this case was filed, on the 18th April, 1859, by Reynolds, Devoe & Co., and other judgment creditors of Adolph Reis, on behalf of themselves and such other creditors as might come in and contribute to the expenses of the suit, against said Adolph Reis, England & Lee, and certain other creditors who had levied attachments on some of said Reis' property; and sought, principally, a settlement of a deed of assignment executed by said Reis, to one J. C. Perkins as trustee, for the benefit of all his creditors, and a distribution of the funds among the creditors who might be found entitled to share in it. The following is a copy of the assignment :

“State of Alabama, } This indenture, made and entered
Perry county. } into this 23d April, 1858, by and
between Adolph Reis, of the town of Marion, county of
Perry, and State of Alabama, merchant, of the first part,
and James C. Perkins, of said county and State, of the
second part, *witnesseth*, that whereas the said party of the
first part is indebted to divers persons, in considerable
sums of money, which he is at present unable to pay
in full, and is desirous to convey all his property for
the benefit of all his creditors : now the party of the first
part, in consideration of the premises, and of one dollar
paid to him by the said party of the second part, hereby
grants, bargains, sells, assigns, and conveys, unto the party
of the second part, his heirs, and assigns, all his lands,
tenements, hereditaments, goods, chattels, property, and
choses in action, of every name, nature, and description,
wheresoever the same may be ; to have and to hold the
said premises, unto the said party of the second part, his
heirs, and assigns ; but in trust and confidence, neverthe-
less, to sell and dispose of the said real and personal estate,
and to collect the said choses in action, using a reasonable
discretion as to the times and modes of selling and disposing
of said estate, as it respects making sales for cash or on
credit, at public auction or by private contract ; and with
the right to compound for the said choses in action, taking
a part for the whole, when the said trustee shall deem it

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expedient so to do; and with full power to appoint such clerks, agents, or attorneys, as may be necessary for the purpose of executing the trusts declared in these presents; but with the distinct understanding, that said party of the second part shall not be held liable for the default of such clerks, agents or attorneys as he may employ, but is only to exercise a sound discretion and judgment in the employment and superintendence of the same, and is to exercise such care and diligence as a prudent man would exercise in and about his own business, in managing and executing this trust; and in trust to dispose of the proceeds of the said property in the manner following: *first*, he shall pay the costs and charges of these presents, and the expenses of executing the trusts declared in these presents; *second*, he shall distribute and pay the remainder of the said proceeds to and among all the creditors of the party of the first part, ratably, in proportion to their respective debts; and if there should be any surplus, after paying all the parties who have debts against the said Adolph Reis, then in trust, *third*, to pay over such surplus to the party of the first part, his executors, administrators, or assigns. And the party of the first part hereby constitutes and appoints the party of the second part his attorney irrevocable, with power of substitution, authorizing him, in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts, matters, and things, to carry into effect the true intent and meaning of these presents, which the party of the first part might do if personally present. And the party of the second part, hereby accepting these trusts, covenants to and with the party of the first part to execute the same faithfully; and the party of the first part hereby covenants with the said trustee, party of the second part, from time to time, and at all times when requested, to give him all the information in his power respecting the assigned property, to execute and deliver any and all such instruments of further assurance as the party of the second part shall be advised, by counsel learned in the law, to be necessary to carry into full effect

the true intent and meaning of these presents. In testimony whereof," &c. (Signed by both parties.)

The property conveyed by this assignment consisted of a store-house and lot, a stock of goods, and outstanding notes and accounts. The trustee took possession of the property under the deed, and commenced to execute the trusts; but, in a day or two afterwards, the defendants sued out their several attachments, which were levied by the sheriff on the stock of goods, and the same was afterwards sold by him under the attachments. The bill alleged, that the trustee refused to sue for the property, and declined further to execute the trust; and prayed that a trustee, or receiver, might be appointed, to take charge of the property and execute the trust. The bill alleged, also, that England & Lee, who were among the attaching creditors, "by virtue of some pretended lien, or claim of title, on or about the — day of —, 1858, sold the said store-house and lot, for about the sum of \$5,030, and claimed the proceeds of said sale under and by virtue of their said pretended lien or mortgage, and appropriated the same to their own use;" "that the indebtedness of said Reis to said England & Lee, to the amount of \$2,598, on which they sued out the attachment hereinbefore described and referred to, was in fact a part, and constituted a portion, of the debt which said England & Lee pretended was secured by their said pretended mortgage, and for the satisfaction of which the said store-house and lot were sold by them, as aforesaid, under their said pretended mortgage, or lien, or claim of title; and complainants charge and insist, that, as against them, said England & Lee have no right to avail themselves of both these remedies;" also, "that the said sum of \$5,030, for which said store-house and lot were sold under the pretended mortgage of said England & Lee, was more than sufficient, even if they have any just claim against said Reis, secured by any trust or mortgage; to pay off and satisfy any and all such claims; and that said England & Lee, upon a fair accounting, would be indebted to complainants for all, or a part of said sum of

money, the proceeds of the sale of said house and lot." The bill contained, also, a prayer for an account against England & Lee of the money received by them from the sale of the house and lot, and the general prayer for other and further relief.

England & Lee, with some of the other attaching creditors, demurred to the bill, and assigned the following causes of demurrer: "1st, that there is no equity in said bill; 2d, that the instrument in writing under which complainants claim is void for uncertainty on its face, not having the names of the creditors of said Reis, nor the amounts to each, any, or all of them; 3d, that said instrument is void, because it does not set forth the amount, value, or description of the property pretended to be conveyed by it; 4th, that said instrument is void on its face, because it leaves the sale, as to times and modes, to the discretion of the trustee, and allows him to sell for cash or on credit; 5th, that the creditors of said Reis are not parties to said instrument, nor does the bill aver that they, or any of them, assented thereto, or knew of the existence thereof, before the issue and levy of the attachments mentioned; 6th, that the said instrument was only a power to the said James C. Perkins, until the creditors of Reis became parties thereto, and that the issue and levy of the defendants' attachments, before said creditors assented and became parties thereto, was a revocation of said power, and the property levied on became and was subject to said attachments."

In overruling the demurrer, the chancellor delivered the following opinion:

CLARK, Ch.—"The assignment is not void for uncertainty, because it does not name the creditors or the amount due to each. This must necessarily be the form of every general assignment for the benefit of all the assignor's creditors. If it is not, the assignment, though general as to the property conveyed, would be special as to the persons named. Nor was it necessary that the assignment should set out the amount, value, and description of the

property assigned. Ever since the cause of *Robinson v. Rapelye & Smith*, (2 Stew. 86,) which has been repeatedly re-affirmed by the supreme court, the law in this State has been, that the assignment is valid without any special description; and where the assignment is general, conveying all the debtor's property for the payment of his debts, there seems to be great propriety in the description being general. Similar decisions have been made elsewhere. That the assignment is not vitiated by the discretion reposed in the trustee, as to selling publicly or privately, for cash or on credit, was expressly decided in the case of *Abercrombie v. Bradford*, (16 Ala. 560,) which was re-affirmed in *Shackelford v. P. & M. Bank*, 22 Ala. 238.

"The next ground of demurrer is, that the creditors of Reis are not parties to the assignment, nor does the bill aver that any of them assented thereto, or knew of the existence thereof, before the issue and levy of their attachments. This is evidently the important question for consideration. It is insisted that this case comes within the influence of the case of *Elmes v. Sutherland*, (7 Ala.,) and that the assignment is a mere revocable power, as it had not been assented to by any of the creditors before the levy of the attachments; and that many of them had in fact dissented from it, by suing out their attachments, and seizing the assigned effects. The case of *Elmes v. Sutherland* was a conveyance for the purpose of securing the payment of certain specified debts, some of which were past due, and others running to maturity; fixing a distant day after the maturity of the youngest debt for the execution of the trust, and providing that the debtor should continue in the meantime in the possession and use of the property. As to such cases, the court there laid down the law to be, that the deed, until it was assented to by the creditors whose debts were intended to be secured, was a mere revocable power. But that case is not like the present. Here is an absolute conveyance, of all the debtor's property, to a trustee, to pay all the debtor's creditors, without condition. It is not a deed, technically, of three parts. To be

binding on the debtor and trustee, it does not require the consent in any way of any creditor.

"In *Hodge v. Wyatt*, (10 Ala. 273,) the supreme court said, that such a deed as that in *Elmes v. Sutherland* 'must not be confounded with a general assignment, for the benefit of all or particular creditors; which operates, in general, without the express assent of the creditors, as assent is implied until the contrary is shown, in consequence of the benefit which must result to them from the instrument.' In *Kinnard v. Thompson*, (12 Ala. 491,) the judge who delivered the opinion of the court says, that in the class of cases like *Elmes v. Sutherland*, it is clear from the deed that the debtor intended it to operate as a conveyance only in the event that the delay stipulated for was given; and that the difference between these cases and the case then under consideration, consisted in the fact, that no delay in that case was stipulated for by the debtor, and that the property conveyed was absolutely, and under all circumstances, devoted to the payment of the specified creditors. See, also, *Maulden, Montague & Co. v. Armistead*, 14 Ala. 702; and, coming to a more recent period in our decisions, *Shackelford v. P. & M. Bank*, 22 Ala. 238. In the case last cited, the deed was, as here, a general assignment of all the debtor's property, to trustees, to pay all his debts, without any provision for their becoming parties, or having notice of its existence. It contained, however, a stipulation for the use of the property by the debtor, until the trustees should see proper to sue. There was no difference of opinion among the members of the court, except in reference to the retention of possession; and as to the question now under consideration, Judge Goldthwaite, in delivering the opinion of the court, says—'The simple duty of the trustees was to sell the property, collect the debts, and appropriate the same to the payment of the debts of the assignor, without discrimination or preference;' and he adds, 'We do not see that it was necessary they should be made parties to the deed, or that any notice was required to be given them.' Decisions have been made elsewhere,

that where the assignment is general, without any condition whatever being attached, the assent of the beneficiaries will be presumed.—See 11 Wheaton, 58; 7 Peters, 608-13; 16 Peters, 106-8; 4 Mason, 206; 4 Metcalf, 522; 3 B. Monroe, 218; 3 Humph. 442.

“That a general assignment, for the benefit of all the assignor’s creditors, was not intended to require the assent of any of them to give it validity, necessarily follows, I think, from section 1556 of the Code, which declares, that ‘every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally;’ thus showing, as I think, quite satisfactorily, that no act on their part was necessary to have the benefit of the assignment. This provision of the Code ought to receive a beneficial construction, and, as we have no bankrupt system, to be treated as a substitute therefor to some extent.—See 2 Kent, 532.

“These views accord with most of the American decisions, including the more recent cases in Massachusetts, as shown by the case from 4 Metcalf above cited. But in England, where they have a bankrupt system, it seems from the authorities referred to in a note to section 1036 of Story’s Equity Jurisprudence, and from the view taken by the learned commentator himself, that in all cases of general assignment, if the creditors are not parties, the assignment is deemed revocable by the debtor, except as to those creditors who have assented to the trust, and have given notice thereof to the assignee; on the ground, as stated in *Elmes v. Sutherland*, that until such assent and notice, the assignment is to be treated, as between the debtor and the assignee, as merely directing the mode in which the assignee shall and may apply the debtor’s property for his benefit. This, however, has not been the American doctrine, since the case of *Brooks v. Marbury*, above referred to; and it certainly cannot be the doctrine in this State, under the decision of the supreme court and section 1556 of the

Code. The Alabama doctrine is, that where the conveyance is absolute to a trustee, without condition in any way, for the benefit of all the debtor's creditors, and the deed has been delivered, the debtor cannot revoke the trust without the consent of all the creditors; that the conveyance does not create a mere power to the trustee, or present a mere proposition to the creditors for their acceptance, which, until accepted, the debtor may revoke or withdraw at pleasure; but that it is, in the absence of fraud, an absolute, executed conveyance, upon valuable consideration, for the benefit of the creditors. This being the law, it could not be important whether any of the creditors knew of, or assented to the conveyance, before the levy of their attachments.

“The views above expressed dispose of the sixth ground of demurrer; and leave but the single question to be decided, whether the bill contains equity. That, I think, necessarily follows from what I have said. If the assignment is general, for the benefit of all the debtor's creditors, without fraud, giving no preference to one creditor over another, but appropriating the entire means of the debtor, *pari passu*, to the payment of his debts, a court of chancery will not permit a portion of the creditors to seize upon the assigned effects, by attachment or otherwise, and appropriate them to the satisfaction of their demands, to the exclusion of the other creditors. It follows, therefore, that a bill to distribute the fund which may have been realized by the officer of the law, on the part of the non-seizing creditors, against the attaching creditors, will be sustained, where the trustee has abandoned the trust.. Indeed, this seems to be the only remedy they can have to reach the fund; and, therefore, a bill for the purpose must have equity.—2 Paige, 568.”

A decree *pro confesso* was entered against the defendant Reis; but answers were filed by the several attaching creditors, asserting the invalidity of the assignment, their own dissent from it, and the priority of lien acquired by

the levy of their attachments. In reference to the sale of the house and lot, under their mortgage, the answer of England & Lee contained the following allegations: "Respondents admit, that on — day of —, 1858, the time stated in said bill, they sold said house and lot; and they say that they sold the same under and in pursuance of the provisions of a mortgage, a copy of which is hereto attached, marked exhibit 'A', and prayed to be taken as a part of this answer; and respondents say, that on the day of the date of said mortgage, they sold and conveyed said house and lot to said Reis, who gave them the notes mentioned in said mortgage for the purchase-money, and, in order to secure the payment of said notes, and in compliance with the terms of said sale, executed the said mortgage to them. Respondents admit, that they sold said premises under said mortgage, and appropriated the proceeds of said sale to their own use, in part satisfaction of said notes, as they insist they had a right to do; and they aver that the proceeds of said sale were not sufficient to pay said notes, and that a balance is still due to them on account of the same."

By agreement of counsel, it was admitted, on the hearing, that the several attaching creditors dissented from the assignment so soon as they were informed of its existence and terms, and immediately sued out and levied their attachments; that their debts were past due at the time, and that they afterwards recovered judgments at the times stated in their respective answers. On final hearing, on pleadings and proof, the chancellor held, that there was nothing in the assignment which showed that it was intended by Reis to hinder or defraud his creditors; that its validity was not affected by the dissent of the attaching creditors, and that the levy of their attachments gave them no preference over the other creditors; and that England & Lee, having failed to produce any proof of their mortgage, were accountable to the other creditors for the proceeds of the house and lot. He therefore ordered a reference to the master, to take proof of the several debts due to

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the respective creditors, with an account of the assigned property, and directed the fund to be distributed *pro rata* among all the creditors whose debts were proved.

From this decree the attaching creditors appeal. The first nine assignments of error are founded on the overruling of the demurrer to the bill; and the tenth assignment is, "that the property mortgaged to England & Lee was not subject to distribution among the creditors of Reis, without regard to the paramount lien created by their mortgage."

WM. M. BROOKS, for appellants.

J. R. JOHN, *contra*.

A. J. WALKER, C. J.—The chancellor overruled the demurrer to the complainants' bill. He considers, in an elaborate opinion, the various points arising upon the demurrer. Without committing ourselves to all the expressions contained in that opinion, we are fully satisfied with the conclusions attained, and do not think any remarks of ours necessary to vindicate their correctness. We merely cite, in support of the position that the assignment was not vitiated by the discretion given the trustee as to the terms and mode of sale, the cases of *Miller v. Stetson*, 32 Ala. 161; *S. C.*, 36 Ala. 642; and *Walthall v. Rives, Battle & Co.*, 34 Ala. 91; and refer to Burrill on Assignments, 330 to 340, for an able review of the authorities upon the question, whether the assent of the creditors was necessary to the maintenance of the assignment.

[2.] An approval of the chancellor's rulings upon the demurrer, leads to an affirmance upon every point, except the one presented by the 10th assignment of errors. We understand the chancellor to decide, that England & Lee can receive no benefit in this case from the mortgage to them by Adolph Reis, and the sale under that mortgage. This is put upon the ground, that England & Lee failed, on the hearing of the cause, to produce the mortgage, or bring forward proof in reference to the same.

The testimony is silent in reference to the mortgage; and the chancellor's position is correct, unless the mortgage is to be regarded as sustained by the state of the pleadings, between the complainants, on the one side, and England & Lee on the other. The bill alleges, that England & Lee had, on the — day of —, 1858, sold a certain lot, by virtue of some pretended *lien or claim* of title, for about five thousand and thirty dollars, and that they claim the money by virtue of their pretended lien or mortgage; and appropriate it to their own use. The bill further alleges, that the amount for which England & Lee sued out an attachment was a part of the debt which they *pretended* was secured by their *pretended* mortgage, and for the satisfaction of which they sold the lot under their *pretended mortgage, lien, or claim of title*; that they have no right to both the remedies by sale under the mortgage and by attachment; that the sum for which they sold the lot under the *pretended mortgage* was more than sufficient, if they have any just claim, to pay it; and that, upon correct accounting, they would be indebted to the complainants on account of the proceeds of the sale. These allegations may fairly be understood to make the somewhat contradictory assertions, that England & Lee had a mortgage or lien, under which they sold the lot; that it was pretended, not real; that the debts secured thereby were not *bona fide*; that they were discharged by the proceeds of the sale, and that there remained an excess in their hands.

It seems to us clear, that the answer of England, exhibiting a mortgage on the lot, with a power of sale, asserting the *bona fides* of the debts secured, and of the mortgage, and showing that a balance remained due upon the debts secured, after an appropriation of the proceeds of the sale, is responsive to the averments of the bill which we have noticed, and would be evidence against the complainants. This being the case, under the pleadings, England & Lee must be regarded as having shown a mortgage, older in date than the assignment which the bill sets up, and also *bona-fide* debts, secured by the mortgage, which were

satisfied only in part by the sale in pursuance of a power conferred by the mortgage. We decide, therefore, that the chancellor erred in treating the fund arising from the mortgage as assets subject to distribution among the creditors of Reis claiming under the assignment. We find no other error.

We deem it proper to remark, that no question as to the registration of the respective conveyances is raised in this case. If we were to look into that subject, it would not change the result.

Reversed and remanded.

CAGE & SALTER vs. PHILLIPS.

[ACTION OF COVENANT BY LESSOR FOR RENT RESERVED.]

1. *Set-off of damages for misrepresentation.*—Under section 2240 of the Code, damages on account of the lessor's misrepresentations as to the capacity and condition of a mill on the leased premises, are available as a set-off in an action of covenant to recover the rent reserved.
2. *Plea of set-off.*—A plea by the lessee, in an action to recover the rent reserved by the lease, averring that the lessor, pending the negotiations between the parties, misrepresented in a specified particular the capacity of a mill on the leased premises; that the lessee believed the representations to be true, and was thereby induced to consummate the contract; and that, by reason of such misrepresentations, he has sustained great damage, "wherefore he says that said contract is utterly void by reason of said deceit and misrepresentations,"—is a good plea of set-off.
3. *Limitation of action on covenants in lease.*—Under the law which was of force before the adoption of the Code, (Clay's Digest, 327, § 81,) sixteen years was the limitation of an action to recover the rent reserved by a lease under seal; and where the cause of action accrued before the Code went into operation, that statute applies, by virtue of the act approved February 15, 1854.—Session Acts 1853-4, p. 71.

APPEAL from the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THIS action was brought by Elam Phillips, for the use of Ulysses B. Phillips, (in whose name the suit was afterwards prosecuted without objection,) against Loftin Cage and Richard Salter, to recover the rent reserved by a lease under seal; and was commenced on the 13th May, 1859. The leased premises contained a saw and grist-mill; and by the terms of the contract, as stated in the complaint, the lease was to commence on the 8th March, 1844, and to continue two years. The defendants pleaded, "in short by consent, 1st, accord and satisfaction; 2d, payment; 3d, the general issue; 4th, the statute of limitations;" and two other special pleas, which were in the following words:

"5. For a further plea in this behalf, defendants say, that on the said 7th day of March, 1844, and on divers days and times preceding that day, the said Elam Phillips and these defendants were in treaty together for the renting of said mill from said Elam; and defendants aver, that said Elam, as inducement on the part of these defendants to the renting of the same, did say and assert to them as a truth, that the water-power by which said mill was supplied was of nine feet 'live water,' meaning thereby that the fall of said stream of water, at the point at which the water struck the wheel of said mill, was nine feet clear of still water and back water; and defendants say, that they did not know, nor did they inform themselves before the execution of said lease, whether said declaration of said Elam was true or not, but that they believed it to be true, and so believing, and induced thereby, they made and executed with said Elam the contract declared on; and defendants aver, that the said fall of water at said place of contact with said wheel as aforesaid, in fact and in truth, was then but seven feet, and so remained, and was not nine feet, as they were induced to believe by said Elam before making said contract. And defendants further say, that without the said inducement, so held out to them by said Elam, and so confided in and trusted by them, these defendants would not have made said contract with said Elam; and they aver, that, by reason of said water-power being,

as herein averred, less than it was represented to be by said Elam, they have suffered great damage, that is to say, in the sum of \$2,000; wherefore these defendants say, that said contract declared on is utterly void, by reason of said deceit and misrepresentation; and they pray judgment, &c."

"6. And for a further plea, these defendants say, that the said Elam Phillips, before said lease was made, as an inducement to the renting of said mill, did represent to these defendants that the fall of water at said mill was nine feet of 'live water;' that these defendants believed said statement of said Elam, that there was nine feet of 'live water' at said mill, and were not otherwise informed before and at the time said contract was made, and did therefore, confiding in said Elam, make with him said contract; and these defendants aver, that it was discovered after the execution of said contract, that, instead of nine feet of 'live water' at said mill, there was but seven feet of 'live water' in said stream; wherefore these defendants say, that they have been damaged in the sum of \$1,000; and they pray that their said damages may be set off against said demand for rent, and the difference certified in their favor by the jury, for which they pray judgment."

The plaintiff demurred to the fourth, fifth, and sixth pleas. The ground of demurrer assigned to the fourth plea was, "because the limitation of six years is no bar to the action." No causes of demurrer were assigned to the fifth and sixth pleas; but it was consented of record, that he "might take advantage of all causes of demurrer, which, if specially assigned, would be good and valid." The court sustained the demurrer, and its ruling is now assigned as error.

GEO. N. STEWART, for appellants.

B. LABUZAN, and H. F. DRUMMOND, *contra*.

A. J. WALKER, C. J.—The fifth special plea is free from objection, and the court erred in sustaining the plain-

tiff's demurrer to it. The defendants, under our statute, have a right to set off damages which the law is capable of measuring accurately by a pecuniary standard, and which are the result of the fraud alleged in the fifth plea. *Gibson v. Marquis*, 29 Ala. 668; *Bell v. Thompson*, 34 Ala. 633. The averment of damage is sufficiently specific, under the rule of pleading deduced from the Code in the case of *Roberts v. Fleming*, 31 Ala. 683.

It is unnecessary to say anything of the sixth plea. If that plea be good, every defense which could be made under it, could also be made under the fifth. It is, therefore, unimportant, and may be withdrawn.

[3.] Sixteen years was the period of limitation prescribed by the law, as it existed before the adoption of the Code, to the cause of action alleged in the complaint.—Clay's Digest, 327, § 81. The cause of action having accrued before the adoption of the Code, the law as it stood before the Code was adopted must control the question of prescription in this case.—Acts of '53-54, page 71. The period of sixteen years had not expired when this suit was commenced; and therefore the demurrer to the plea of the statute of limitations was properly sustained.

For the error in sustaining the demurrer to the fifth plea, the judgment of the court below is reversed, and the cause remanded.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT JUNE TERM, 1862.

CROCKETT (A SLAVE) vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Competency of juror.*—An assault with intent to commit murder is “an offense of the same character” as murder, within the meaning of the statute (Code, § 3583) defining the grounds of challenge to jurors in criminal cases.
2. *Homicide of slave by slave; sufficiency of verdict.*—The murder of a slave by another slave is an offense within the provisions of section 3312 of the Code; and since the statute does not create different degrees of the offense, it is not necessary that the verdict should specify any degree.

FROM the Circuit Court of Pike.
Tried before the Hon. JOHN COCHRAN.

No counsel appeared for the prisoner.
M. A. BALDWIN, Attorney-General, for the State.

A. J. WALKER, C. J.—We are not informed, either by an argument, or by an assignment of errors, of the points which those representing the appellant designed should be

examined by us. After a most careful examination of the record, we have been able to find no error in the proceedings of the circuit court, and its judgment must be affirmed. We proceed, however, to note and remark upon the questions raised by the appellant's exceptions.

1. A juror, who had been, within twelve months, indicted for an assault with intent to commit murder, was rejected, the prisoner objecting. Section 3583 of the Code makes the indictment, within twelve months next preceding, for an offense of the same character as that alleged against the prisoner, a ground of challenge. An assault with intent to commit murder, is an offense of the same character with murder. They differ only in this, that in murder the purpose is accomplished. The will and the tendency of conduct are precisely the same in both cases. The identity of "*character*" between those two offenses is as manifest, as between an assault and a battery; and the question here is the same with that which would arise, if one indicted for an assault had been challenged on the trial of one charged with a battery.—See *Johnson v. State*, 29 Ala. 62.

[2.] It seems to have been contended for the prisoner below, that the murder of a slave by a slave was not punishable under the laws of the State; and that, if it was, it was requisite for the jury to specify in their verdict the degree of the offense. The first clause of section 3312 of the Code, it is settled by the case of *Seaborn & Jim v. State*, (20 Ala. 15,) includes the offense of murder of a slave by a slave.—Clay's Digest, 272, § 2; Code, §§ 3312, 3314. Murder, committed by a slave, is not divided into degrees; and the jury could, therefore, not be required to specify the degree in their verdict.—*Mose v. State*, 35 Ala. 431.

The judgment of the circuit court is affirmed, and the sentence of the law must be executed as therein ordered.

PRICE vs. LAVENDER.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST ENDORSER.]

1. *Liability of irregular endorser.*—In an action by the payee of a note payable in bank, an averment that the defendant endorsed and delivered the note to the plaintiff, that it was protested for non-payment, and that notice thereof was given to the defendant, is sufficient to show a cause of action in favor of the plaintiff against the defendant.
2. *Presumption as to endorsements.*—Endorsements in blank on a note are presumed, in the absence of evidence to the contrary, to have been made in the order in which they appear on the note; and where the plaintiff's name is thus endorsed on it, the legal presumption is, that the note has been regularly returned to him.
3. *Proof of endorsement and plaintiff's ownership.*—In an action by the payee, against an irregular endorser of a note payable in bank, the plaintiff is not required to prove either the endorsement or his ownership of the note, unless they are denied by plea verified by affidavit.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Robert S. Lavender, against Caleb Price, jr. The complaint contained the common counts for money loaned, money paid, and on an account stated, and a special count in the following words: "The plaintiff claims of the defendant the sum of \$110, on a promissory note made by one W. H. Dupree on the 13th day of August, 1857, and payable three months after the date thereof, to the order of the said plaintiff, negotiable and payable at the Bank of Mobile; which said note, on the 19th day of August, 1857, was endorsed and delivered by the said defendant to the said plaintiff; and said note, not being paid at maturity, was duly protested, of which said defendant had due notice; which said note, with interest thereon, and costs of protest, is still due." The defendant demurred to this special count, because it showed no cause of action against the defendant in favor of the plaintiff; but the court overruled the demurrer. Issue

was then joined, though the record does not show on what pleas.

On the trial, as appears from the bill of exceptions, the plaintiff produced a note corresponding with that described in the complaint; on which were endorsed the names of the defendant, the plaintiff, and W. Sayre & Co., in the order in which they are here stated; and the two latter endorsements appeared to have been stricken out, by having a pen drawn through them. The plaintiff also proved that the first endorsement was in the hand-writing of the defendant, and then read in evidence the note, endorsement, and protest. This being all the evidence offered by the plaintiff, the defendant demurred to it, and the plaintiff joined in the demurrer. The court overruled the demurrer, and rendered judgment for the plaintiff; and its rulings on the demurrers to the complaint and to the evidence, to which exceptions were reserved by the defendant, are now assigned as error.

G. Y. OVERALL, for appellant.

B. LABUZAN, *contra*.

A. J. WALKER, C. J.—The special count of the complaint alleges, that the defendant endorsed and delivered to the plaintiff a note made by a third person, payable in bank to the plaintiff; that it was protested for non-payment, and that notice thereof was given to the defendant. From the facts thus alleged a right of action in favor of the plaintiff results. The endorsement is an irregular one, made by a person not a party to the instrument. Whatever may be the decisions in other countries, the law is settled in this State with respect to such endorsements, that, unexplained, they impose a liability in favor of the person to whom the endorsement is made, against the endorser, which is strictly analogous to the liability upon a regular endorsement.—*Milton v. De Yampert*, 3 Ala. 648; *Jordan v. Garnett*, 3 Ala. 610; *Hall v. Chilton & McCampbell*, 3 Ala. 633; *Hullum v. State Bank*, 18 Ala. 805; *Tiller v.*

Shearer, 20 Ala. 596. See, also, Code, § 1547. The same diligence to collect out of the maker of the note is required to fix the liability upon such irregular endorsement, as would be required to fix the liability of a regular endorser. According to these principles, which are not now open for controversy in this State, the special count of the complaint is free from objection.

The decision is *McInnis v. Rabun*, (1 Porter, 386,) is not opposed to our statement of the law. The suit in that case was by the payee of a note, for the use of others, against one who had made an irregular endorsement. The declaration contained no averment, as the complaint here does, that the endorsement was made to the payee; and therefore the declaration could not have been regarded as showing a right of action in the plaintiff. It was for this failure to show a liability to the plaintiff that the declaration was held bad.

[2.] The evidence in this case established facts identical with those averred, except that the production of the note showed that, beneath the name of Price, endorsed on the note, were written in succession the names of the plaintiff and of W. Sayre & Co.; and that the endorsement of Price, being in blank, did not show that it was made to the plaintiff. The fact that the names of the plaintiff and another were written in succession beneath the defendant's, does not authorize the inference, sought to be drawn for the appellant, that the plaintiff endorsed to the defendant, and the defendant to W. Sayre & Co.; and that the defendant's name was written above the plaintiff's by mistake. The presumption is precisely the reverse—that the endorsements which are posterior in order, were posterior in point of time. Nor does the endorsement by the plaintiff, found upon the note, warrant the inference that he was not entitled to sue. "When a note is in the possession of one who appears to have previously transferred it, the legal presumption is that it has been regularly returned to him." *Herndon v. Taylor*, 6 Ala. 461.

[3.] The defendant does not, by sworn plea, controvert

either the making of the endorsement, or that it was made to the plaintiff. In the absence of a plea, verified by affidavit, section 2279 of the Code dispenses with proof of the execution of the endorsement.—*Agee v. Medlock*, 25 Ala. 281; *Ala. & Miss. River Railroad Co. v. Sanford*, 36 Ala. 703; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; *Frazier v. Browning*, 10 Ala. 817; *Tarver v. Nance*, 5 Ala. 717; *Dew v. Garner*, 7 Porter, 505; *Nesbit v. Pearson*, 33 Ala. 668; *Smith v. Harrison*, *ib.* 706. It was, therefore, no objection to a recovery in this case, if the plaintiff had offered no proof of the execution of the endorsement.

We have a rule of practice, adopted in 1853, which is as follows: "When an action is brought under section 2129 of the Code, by any transferree, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit."—28 Ala. 8; 31 *ib.* 5. Section 2129 requires suits, upon such contracts as that which is the cause of action in this case, to be brought in the name of the party really interested.—*Crook v. Douglass*, 35 Ala. 693. This is, therefore, an action under section 2129 of the Code, and can only be brought in the name of the party really interested. It is also an action by an endorsee; for, to constitute an endorsement, it is not indispensable that the writing should effect a transfer of the bill or note. *Seabury v. Hungerford*, 2 Hill, (80,) 83; *Dean v. Hall*, 17 Wend. 214, 216, 217; Story on Prom. Notes, § 133; *Ala. & Miss. River Railroad v. Sanford*, *supra*. The endorsement is certainly irregular, because it was not made by a party to the note; but it is not on that account the less an endorsement. The plaintiff is an endorsee, bringing an action "under section 2129 of the Code;" and, falling precisely within the rule of practice above copied, is not required "to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit." If the plaintiff were required, in the absence of a sworn plea, to show that he was the person to whom a blank

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endorsement was made, the *onus* of proving his interest in the cause of action would be imposed upon him, and the rule of practice would be violated. It was, therefore, not incumbent on the plaintiff to prove, that he was really the endorsee.

The demurrer to the evidence was properly overruled, and the judgment must be affirmed.

GRIFFITH vs. PARMLEY.

[ACTION FOR RENT.]

1. *Estoppel against tenant from denying landlord's title.*—A tenant, when sued for rent under an express contract, is estopped from denying the title of his landlord, or from insisting that, under section 2129 of the Code, the action should have been brought in the name of certain infants, to whom the land belonged, and whose guardian the plaintiff was.

Appeal from the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THIS action was brought by Mrs. Maria L. Parmley, against George R. Griffith, to recover the sum of \$500, alleged to be due for the rent of a house and lot in the city of Mobile, for the term of one year, ending on the 31st October, 1860; and was commenced on the 8th November, 1860. The defendant pleaded the general issue, set-off, the failure of the plaintiff to put the premises in tenantable condition, that the contract of lease was rescinded by agreement between the parties, and that the plaintiff was not the party really interested in the recovery; and issue was joined on these pleas. On the trial, as appears from the bill of exceptions, the plaintiff proved the contract of lease as alleged, by one James Sanford, who acted as her agent in making the contract; and the witness further

testified, that the house and lot belonged to the plaintiff's minor children, as heirs-at-law of L. Parmley, deceased; that the plaintiff had a dower interest in the premises, was in actual possession at the time of the contract, and was the guardian of her minor children. The defendant adduced evidence tending to show that the plaintiff's agent, at the time the contract was made, agreed to repair the house and put it in good tenantable condition; that the repairs were never made, and that he notified the plaintiff's agent, in consequence of the failure to make the necessary repairs, that he would not occupy the premises. The defendant requested the court to instruct the jury, "that if the premises belonged to the minor heirs of L. Parmley, deceased, for whom plaintiff was guardian when said renting took place, and when this suit was brought, then the plaintiff cannot recover." The court refused to give this charge, and the defendant excepted to its refusal; and he now assigns the same as error, with other matters.

WM. BOYLES, for appellant.

ALEX. MCKINSTRY, *contra*.

STONE, J.—In the case of *Terry v. Ferguson*, (8 Porter, 502,) this court said, that to a "declaration alleging a state of facts which shows that plaintiff accepted a lease of the defendant, and undertook to pay him rent, the former cannot object a want of title in the latter."—See, also, *Perkins v. Governor, Minor*, 352; *Shelton v. Eslava*, 6 Ala. 233; *Bird v. Daniel*, 9 Ala. 302.

In the present record, the testimony tends to show that the appellant accepted a lease from Mrs. Parmley, and that he was not disturbed or hindered in the enjoyment of the possession. Under the charge of the court, the jury must have found this to be the true state of the case. This case is thus brought within the rule above declared, and Mr. Griffith must be held estopped from disputing the title of Mrs. Parmley, his lessor.

We do not think the present record discloses a case

which, under the operation of section 2129 of the Code, requires the suit to be brought in the names of the minor wards of Mrs. Parmley. To allow that rule to operate in this case, would overturn the sound principles declared above. Moreover, there are many cases of active trust, where the trustee could not administer the trust fund, if the beneficiaries alone could sue for and recover it.

The principles above declared are decisive to show that the city court correctly refused to give charges numbered 1, 2, 4, and 5, as requested by defendant. We have noticed all the material points made by the argument, and our conclusion is, that the judgment of the city court must be affirmed.

MITCHELL vs. INGRAM.

[ACTION ON FORFEITED REPLEVY BOND.]

1. *Validity of replevy bond.*—A replevy bond, taken by the sheriff from a stranger, conditioned for the payment of the attachment, or the delivery of the property at the termination of the attachment suit, though defective as a statutory bond, (Code, § 2536,) is good as a common-law bond.
2. *Variance in description of bond; parol proof of identity.*—The omission of seventy-four cents, in describing the attachment in the replevy bond, is an immaterial variance, which is susceptible of explanation by parol evidence of identity.
3. *Estoppel by bond.*—In an action on a forfeited forthcoming or replevy bond, the obligors are estopped from denying the defendant's title to the property, or showing that it was not subject to the attachment.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Robert A. Ingram, against W. M. A. Mitchell and John T. Leftwich, and was founded on a penal bond, the condition of which was as follows :

"The condition of this obligation is such, that if the above bound W. M. A. Mitchell do pay, or cause to be paid, to Hugh Lockett, the sheriff of said county, the sum of \$192, the amount of an attachment in the office of said sheriff against A. D. Waller, in favor of R. A. Ingram, and the costs that may accrue in said attachment, or deliver unto the said sheriff, in the town of Dadeville, the following property, to-wit, one negro boy, Ben, which was this day levied on to satisfy the attachment by the sheriff, at the termination of said suit, then this obligation to be void!" The complaint alleged, as a breach of the condition of the bond, "that at the fall term, 1858, of said circuit court of Tallapoosa county, the said attachment suit was terminated, by the plaintiff recovering a judgment upon the same against said A. D. Waller, the defendant in said attachment, for the sum of \$206.43, besides costs of suit; and plaintiff avers, that said defendant, W. M. A. Mitchell, did not pay, or cause to be paid, unto the said Hugh Lockett, sheriff of said county, or to any other sheriff or person, the sum of \$192, the amount of said attachment, and the costs thereof, or deliver unto the sheriff as aforesaid, in the town of Dadeville, or anywhere else, the said negro boy Ben, which was levied on to satisfy said attachment, on, before, or at the termination of said suit, although often requested so to do; and plaintiff avers, that, at the time of the making of said bond by said defendants, an attachment, issued from the circuit court of Tallapoosa county, in favor of R. A. Ingram, against A. D. Waller, returnable to the spring term of said court, 1858, for the sum of \$192.74, was in the hands of said Hugh Lockett, sheriff of said county, and had been levied by him, on the 10th November, 1857, on the said negro Ben; and that said bond was given by said defendants to obtain the possession of said negro, and that, in consideration of said bond, said negro was delivered to said defendant, W. M. A. Mitchell; and, in consequence of said breach, plaintiff says he has sustained damage," &c. The defendants demurred to the complaint, "because the bond therein described, and upon which the

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suit was brought, required the money mentioned in the attachment to be paid, or the property levied on to be delivered by the termination of the suit; because the sheriff had no right to take such bond; because the breaches assigned are for not paying the money, and for not delivering the property by the termination of the suit, when the law allows thirty days after the rendition of the judgment for the delivery of the property; and because said bond requires the payment of the money, or the delivery of the property, in any event, by the termination of the suit, and whether or not there is any judgment in favor of the plaintiff, and imposes on the makers an obligation not authorized by law." The court overruled the demurrer, and the defendants then pleaded over; but the record does not show what pleas were filed.

On the trial, the plaintiff read in evidence the bond on which the suit was founded, and on which was an endorsement of forfeiture by the sheriff; and then offered in evidence the bond and affidavit in the attachment suit, in which the plaintiff's debt was stated to be \$192 74. The defendants objected to the admission of the papers in the attachment suit as evidence, on account of the variance in the description of the debt on which the attachment was founded, and reserved an exception to the overruling of their objection. The plaintiff then proved, by the deputy sheriff, the levy of the attachment on the slave Ben, the delivery of said slave to the defendants on the execution of the bond here sued on, and that the slave was carried off and sold by the defendant Mitchell before the rendition of judgment in the attachment suit; "which was objected to by the defendants," and an exception reserved to the overruling of their objection. The defendants then offered in evidence a mortgage, dated the 9th November, 1857, by which said A. D. Waller, the defendant in the attachment suit, conveyed the slave Ben and another to one Ridgway, and which contained a power of sale, authorizing said Ridgway, in the event that said Waller failed to pay certain attachments which had levied on the slaves, to adver-

tise and sell them. In connection with this mortgage, the defendants offered in evidence the several attachments therein mentioned, two of which were in favor of the defendant Mitchell; and offered to prove, that these attachments were levied on the slave, and that the slave was delivered to Ridgway under the mortgage, before the levy of the plaintiff's attachment; stating that they offered this evidence "for the purpose of proving that the slave did not belong to said Waller at the time of the levy of the plaintiff's attachment, and was not subject to levy under said attachment." The court excluded this evidence, on the plaintiff's objection, and the defendants excepted.

The several rulings of the court on the pleadings and evidence, to which exceptions were reserved, are now assigned as error.

J. FALKNER, for appellant.

BROCK & BARNES, *contra*.

A. J. WALKER, C. J.—A reply to all the objections made to the complaint in the court below, is found in the incontrovertible proposition, that the bond is good at common law, although, by reason of its non-conformity to some statutory requisitions, it cannot be enforced in the summary manner pointed out by the statute.—*Meredith v. Richardson*, 10 Ala. 828; *Whitsett v. Womack*, 8 Ala. 466; *Branch Bank at Mobile v. Darrington*, 14 Ala. 192; *Alston v. Alston*, 34 Ala. 15.

[2.] The omission of seventy-four cents in the description of the attachment, is an immaterial variance. The attachment, "and the description of it in the bond, corresponding in all other respects, we cannot doubt that they are the same."—See *Anderson v. Rhea*, 7 Ala. 104, where a similar objection is considered; also, *Dickson v. Bachelder*, 21 Ala. 699. Besides, the variance was susceptible of explanation by parol proof. The evidence introduced for that purpose was admissible, and established the identity of the attachment with that described.—*Meredith v. Richardson & Oneal*, 10 Ala. 828.

[3.] The conveyance of 9th November, 1857, by A. D. Waller to the defendant, was inadmissible. The tendency of such evidence was to show title in another than the defendant in the attachment; and this the obligor in the delivery bond was by his bond estopped from doing.—*Meredith v. Richardson*, *supra*; *Mead v. Figh & Blue*, 4 Ala. 279; *Jemison v. Cozens*, 3 Ala. 636; *Dunlap v. Clements*, 18 Ala. 778; *Braley v. Clark*, 22 Ala. 361; *Cooper v. Peck & Clark*, *ib.* 406; *Gray v. McLean*, 17 Ill. 405; *Bursley v. Hamilton*, 15 Pick. 40; *Page & Bacon v. Butler*, 15 Mo. 73; *Dezell v. Odell*, 3 Hill, 215; *Savage v. Gunter*, 32 Ala. 469; *Gary v. Hathaway*, 6 Ala. 164.

The decisions above cited from our own reports, when followed to their legitimate sequences, commit this court to the proposition, that the obligors in a forthcoming bond, which has been forfeited, cannot be permitted, when the suit is on the bond, to controvert the defendant's property in the replevied things, by showing either an entire or a partial want of title. Hence, the proof of pre-existing liens was inadmissible.

Judgment affirmed.

HADEN AND WIFE vs. TUCKER.

[TROVER FOR CONVERSION OF SLAVE.]

1. *What title will support action.*—Where a mother purchases a slave for her infant daughter, with money furnished for that purpose by the child's grandfather, but accepts a bill of sale to herself, the legal title vests in her, and not in her daughter; and the fact that she objected to the bill of sale at the time, because it did not convey the title to her daughter instead of herself, and that the vendor then promised to execute another bill of sale at some future time, does not vary the case.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. PORTER KING.

THIS action was brought by Joseph B. Haden and Emma D., his wife, against James W. Tucker, to recover damages for the conversion of a slave named Ellen. The defendant pleaded not guilty, "in short by consent, with leave to give any special matter in evidence"; and issue was joined on that plea. The material facts of the case, as proved on the trial, are these: The slave in controversy was purchased by Mrs. Perkins, the mother of Mrs. Haden, in 1839, for her said daughter, who was then an infant; and the greater part of the purchase-money was furnished for that purpose, by Solomon Perkins, who was the paternal grandfather of the child. The vendor's agent, with whom the contract was made, wrote out a bill of sale for the slave, and carried it to Mrs. Perkins, who paid the purchase-money as agreed, but objected to the bill of sale, because it conveyed the title to her instead of her daughter; and the agent then promised that his principal should execute another bill of sale according to her wishes. The slave remained in the possession of Mrs. Perkins, who always recognized her as belonging to her daughter. In 1840, Mrs. Perkins married one Woolworth; and the slave being afterwards seized under execution against said Woolworth, a claim was interposed by Mrs. Woolworth, for her said daughter, and bond given to try the right of property. Mrs. Woolworth and her husband soon afterwards removed to Texas, and the slave went into the possession of Solomon Perkins, who declared his intention to hold her for his grand-daughter. Solomon Perkins died in 1845; and on the division of his property in April, 1846, the slave was allotted to the defendant, who had married one of his daughters, as a part of his wife's distributive share of the estate. The court charged the jury, in effect, that the plaintiffs could not recover on these facts; and this charge, to which the plaintiffs excepted, is now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellants, cited

Rowan v. Hutchinson, 27 Ala. 334; *Sanders v. Stokes*, 30 Ala. 432; *Mobile Marine Dock and Mutual Insurance Co. v. McMillan*, 31 Ala. 721; *Isbell v. Brown*, 11 Ala. 1009; *Smith v. Armistead*, 7 Ala. 702; *Belcher v. Saunders*, 34 Ala. 9; 4 Selden, 497; 1 Greenl. Ev. §§ 24, 211.

WM. M. BROOKS, *contra*, cited *Jones v. Trawick*, 31 Ala. 253; *Sanford v. Howard*, 29 Ala. 684; and *Dill v. Thomason*, 30 Ala. 444.

STONE, J.—Only a single question has been argued, and we propose to confine our remarks to that question. The first charge given to the jury, and excepted to, raises the question, can the plaintiffs maintain the action of trover on the facts of this case, as supposed in that charge? There is nothing in this record from which we can infer that the sale of the slave Ellen was completed, and the bill of sale afterwards executed; and hence, we need not consider how we would decide such supposed case. On the contrary, the facts of the case tend to show that the parties intended that whatever contract they made should be evidenced by writing, and that they did reduce it to writing. The writing is, then, the only evidence before us of any title actually conveyed. That writing vested the title in Mrs. Woolworth, then Mrs. Perkins. This conclusion rests on the familiar principle, that when parties reduce their contract to writing, all previous negotiations are presumed to be merged in the writing.—*Dill v. Thomason*, 30 Ala. 444, 454, and authorities cited.

But it is contended, that Mrs. Woolworth objected to the bill of sale, because it was made to her, and not to her daughter; and it was agreed that another title, directly to her daughter, the female plaintiff, should be substituted for the one then executed. This, we think, can not vary the case. Although Mrs. Woolworth objected to the title, on the ground stated, still she accepted it; and we are not informed that it has ever been changed. The view most favorable to plaintiffs which we could take of this case, would lead us to hold, that the parties had

intended to make one contract, and had made another. In such case, the unexecuted intention must yield to the contract actually made.—*Sanford v. Howard*, 29 Ala. 684; *Mobile Marine Dock and Mutual Insurance Co. v. McMillan*, 31 Ala. 722.

It is manifest from what we have said, that the evidence in this case fixes the title in Mrs. Woolworth. She alone, and those claiming in her right, could have maintained a suit for a breach of that contract; and she alone had the legal title, which was necessary to maintain the action of trover. Whether she might have been declared a trustee, and compelled, in equity, to surrender the slave to her daughter, is a very different question, not necessary to be here decided.—See *Jones v. Trawick*, 31 Ala. 253; *Sledge v. Clopton*, 6 Ala. 589.

We do not think the case of *Rowan v. Hutchinson*, 27 Ala. 334, when properly understood, is adverse to our rulings above.

What we have said is decisive of this case, and the judgment of the circuit court is affirmed.

JENNINGS vs. MOSES.

[APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION.]

1. *Validity of grant of administration.*—A grant of administration as in case of intestacy, where the decedent left a nuncupative will, which has been duly admitted to probate, is voidable and revocable.

APPEAL from the Probate Court of Coffee.

IN the matter of the estate of John A. Jennings, deceased, on the application of Robert M. Jennings for the revocation of letters of administration granted by said probate court to Linton L. Moses, The decedent died, in

August, 1853, in Fayette county, Georgia, where he was domiciled at that time; and left a nuncupative will, which was duly admitted to probate by the court of ordinary of that county. Letters of administration on his estate, with the will annexed, were granted by said court of ordinary to his widow, Mrs. Sarah Jennings, who reduced to possession all the assets belonging to the estate, and removed to Coffee county, Alabama, where she died in December, 1859. Some time during the year 1859, some of the negroes belonging to the estate, which the administratrix had reduced to her possession, were brought, with her consent, into Coffee county. On the 6th November, 1860, letters of administration *de bonis non*, with the will annexed, were granted by said court of ordinary to the petitioner, Robert M. Jennings; and in December, 1860, letters of administration were granted by the probate court of Coffee county, to the defendant, Linton L. Moses. The petitioner alleged, that the defendant's letters of administration were void, "because there was no property belonging to said estate within the county of Coffee, under the jurisdiction of said court, and subject to be administered." The defendant's letters of administration are no where set out in the record; and neither the petition nor the evidence adduced on the hearing, as set out in the bill of exceptions, discloses their character. On the evidence adduced, all of which is set out in the bill of exceptions, the court decided, "that the grounds for removal set forth in the petition were not sustained by the proof," and therefore dismissed the petition; and this decree is now assigned as error.

MARTIN, BALDWIN & SAYRE, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

A. J. WALKER, C. J.—The administration of the appellee, upon the facts proved, was voidable and revocable, because it was a general administration granted as in case of intestacy, when the deceased died testate, leaving a nuncupative will.—*Broughton v. Bradley*, 34 Ala. 694,

Goldsby v. Goldsby's Adm'r.

For that reason, the court below erred, and its judgment must be reversed, and the cause remanded. In reversing upon this ground, we do not mean to affirm that there is no other valid objection to the administration, but we remain uncommitted as to all other points presented by the brief of counsel.

GOLDSBY vs. GOLDSBY'S ADM'R.

[BILL IN EQUITY FOR JUDICIAL CONSTRUCTION OF WILL AND SETTLEMENT OF DECEDENT'S ESTATE.]

1. *Bequest to children and "heirs of their body," with executory devise over.*

Where a testator devises and bequeaths property, real and personal, to each of his children; declaring, in a subsequent clause, "all of the above property is given and bequeathed to my children and the heirs of their body, and for their proper benefit and use, and not to be disposed of by the husbands of my said daughters, and to revert to my family in all cases where my children may die without issue"; and adding, "this item is merely intended to entail the property given to my sons, as far as can be done consistently with the laws of the country,"—an absolute estate is thereby vested in a son who survives the testator, and then dies leaving children, and such children take nothing under the will.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Carlos Reese, as the administrator of the estate of George W. Goldsby, deceased, against the widow and children of said decedent, for the purpose, principally, of obtaining a judicial construction of the will of Thornton B. Goldsby, deceased, who was the father of said George W. Goldsby. Thornton B. Goldsby died in September, 1858, leaving a large estate, consisting of lands and slaves. By his last will and testament, which was duly admitted to probate after his death,

said Goldsby devised fifteen hundred acres of land to each of his children, and directed his negroes to be divided among them, after deducting those bequeathed to his widow; and the sixth item of his will was in the following words: "All of the above property is given and bequeathed to my children and the heirs of their body, and for their proper benefit and use, and not to be disposed of by the husbands of my said daughters Eliza and Elizabeth, and to revert to my family in all cases where my children may die without issue. This item is merely intended to entail the property given to my sons, as far as can be done consistently with the laws of the country." George W. Goldsby received under the will of his father a plantation, containing fifteen hundred acres, and about thirty negroes; and he afterwards died, in February, 1861, intestate, leaving a widow and five minor children. The bill alleged, that doubts had arisen, since his death, as to the estate which he took under his father's will; that his estate was largely indebted, and would be insolvent if he took only an estate for life under the will; and that, if he took an absolute estate, it would be necessary to sell some of the property for the payment of debts. The prayer of the bill was for a judicial construction of the will, the administration of the intestate's estate, and general relief. The widow answered, admitting all the allegations of the bill; and a formal answer was filed by the guardian *ad litem* of the infants. On the pleadings and proof, the chancellor rendered the following decree:

CLARK, Ch.—"The only question of difficulty in the case arises upon the construction of the will of the late Thornton B. Goldsby, the sixth clause or item of which was intended to create an executory devise in favor of the surviving members of his family, in the event of the death of any one of his children without issue, as to the property bequeathed to such child. Such a provision in a will, before the Code took effect, would have been void, as tending to a perpetuity. But, by section 1302 of the Code,

as I understand it, that would not now be the case, but an estate in favor of the executory devisee would spring into force, as soon as the first taker died without issue, without regard to the law as previously settled. The title of the first taker is in no way dependent on that of the executory devisee. His title is an estate of inheritance, which he can convey or devise to whomsoever he pleases; but subject at all times to be defeated, in the hands of his vendee or devisee, upon the happening of the event on which the limitation over is made to depend; which limitation the first taker has no power to defeat.—See *Chester v. Grier*, 5 Humph. 26–33; *McRee's Adm'rs v. Means*, 34 Ala. 349–377. This being the case, where is the fee? Certainly in the first taker, and not in his heirs, as they must claim through him, and can have no connection with the executory devisee, whose interest is dormant until the contingency arises.

“Section 1299 of the Code provides, that every estate in lands is to be taken as a fee-simple, although words necessary to create an estate of inheritance may not be used, unless it clearly appears that a less estate was intended. That Thornton B. Goldsby intended by his will to create a qualified estate, is apparent; but still it was a fee-simple, determinable upon the event of the first devisee dying without issue. But it is insisted, that he only intended to create a life-estate in his sons and daughters; and that this intention is manifested, as to his sons, by the concluding sentence of the sixth clause, in which he states, that ‘this item is merely intended to entail the property given to my sons, so far as can be done consistently with the laws of the land’? This was the extent of his intention. It was to entail, if the law would permit. But, as section 1300 of the Code shows that the law would not permit any entailment whatever, the testator consequently had no controlling intention to entail the property, but only a desire to do so if the law would permit him.

“It is further contended, however, that he intended to create a remainder in favor of the children of his children,

in all the property, both real and personal, that might be divided off to them, by the words 'heirs of their body;' and that, under sections 1302 and 1304 of the Code, such issue of the children must take as purchasers, on the death of their respective ancestors, the first takers. Section 1302 of the Code was intended to remove that perplexing question, as to the limitation being good or too remote, and can have no application to the children, as such, of the first takers; and section 1304 applies to a case where the first taker takes only a life-estate. But this is not such a case. Here, George Goldsby had, at least, a qualified fee, which was an estate of inheritance, and not a mere estate for life; and the annexation of the words 'heirs of their body' could, at most, only create a conditional fee at common law, or an estate in fee-tail under the statute *de donis*, if in force; which estate, section 1300 declares, becomes on its creation an estate in fee-simple, and vests in the first taker the same power as in cases of pure and absolute fees; and, while it may be truly said, that such is the effect of this section, so far as the heirs of the body can be considered; still it must not be forgotten, that these several sections of the Code are to be construed *in pari materia*. Consequently, while George Goldsby took a fee, and an inheritable estate, it was qualified, as to the executory devise over, in the event of his dying without issue; but, as to his heirs, or the heirs of his body, in the language of the Code, it was 'pure and absolute;' and, as he did not die without issue, his death consummated his title, discharged of the contingent estate, and gave to his heirs a fee-simple absolute, not by virtue of a remainder created by the will of his father, but as of his own demesne as of fee.

"It is said, however, that this case is within the influence of the decision in *Mason v. Pate's Executor*, (34 Ala. 379,) and that there is here, as there, a life-estate by implication. But the cases are clearly distinguishable. There, the testator willed the property, which his daughter should receive under his will, 'at her death to descend to her bodily heirs'; which was held, under the Code, to vest

only a life-estate in the daughter. But why? because the property was to go 'at her death' to the bodily heirs; showing clearly, by necessary implication, that the testator intended her to have only an estate for life. Here, there are no equivalent words to limit the estate of the first taker. In that case, it is said by the judge who delivered the opinion of the court, that, 'in the application of section 1304 to cases which might arise, it may become material to inquire, whether its provisions embrace conveyances to *A. and his heirs, to A. and his issue, or to A. and the heirs of his body;*' and as the section applies to personal as well as real property, and such words are not necessary to give the absolute ownership of personal property, the section can have no application; and he proceeds to show that the construction insisted on would require the substitution of 'children' for 'heirs of the body,' so that the conveyance or devise would then read 'to A. and his children;' which would not be a life-estate in A., with remainder to his children, but a joint estate with them, or an absolute estate, according to the fact whether or not he had children living at the date of the conveyance. The judge then says, 'The case we have supposed is not that of an estate *in remainder, limited to the heirs, issue, &c., of a person to whom a life-estate in the same property is given.* There is neither a life-estate given, nor a remainder limited; but, on the contrary, if the heirs, issue, &c., take at all under such conveyance, they take jointly with the ancestor.' The case supposed by the court is this case. There is neither life-estate given, nor remainder limited; and the authority, instead of being for the children of the first taker, is clearly against them.

"But here the counsel for the children take the ground, if the opinion of the court is adverse to them on the other view taken, that the context shows sufficient to authorize the court to declare the estate a joint one to George Goldsby and his children. It is true the testator speaks of the children of his children; not in connection with the devises to them, but as to distinct bequests to be raised for

them out of other property. The only words which could, under any circumstances, be construed to extend to the children of his children, are those in connection with 'the heirs of their body,' and 'for their proper benefit and use.' But these words evidently refer to his own children, while there is nothing to show that he intended their issue. Had he intended to create a joint estate between his sons and their children, he would not have declared his intention to entail the property if the law would permit.

"Having arrived at the conclusion that, as to the real estate partitioned to him, George Goldsby took a qualified fee, and that, on his death, it descended to his heirs as heirs, discharged from the limitation over; and that he took, in like manner, an absolute title in the personal estate, which goes to his personal representative; it results that both must be held subject to his debts, and the real estate to the dower of his widow; and as the litigation is of such a character that it is proper a court of chancery should take jurisdiction, and direct the administrator in the discharge of his duties, it will be so decreed."

The chancellor therefore rendered a decree, requiring the creditors of the estate to prove their debts before the master, giving the widow leave to file a cross-bill for the ascertainment of her dower, &c.; and his decree is now assigned as error by the children.

BYRD & MORGAN, for appellant.

BROOKS & GARROTT, *contra*.

STONE, J.—On the questions argued in this court, we fully concur with the chancellor, and adopt his opinion and conclusions; holding, with him, that the estate in controversy must be administered as belonging to the estate of George W. Goldsby, free from all restraints or limitations imposed by the will of his father, Thornton B. Goldsby.

As circumstances may render it necessary, that some modification be made of the chancellor's directions for the further prosecution of this suit, we forbear to express any

opinion on that part of the case, lest we might be understood as merging his decree in ours, and thus placing it out of his power to accommodate his action to the unfolding wants of the litigation.

The decree of the chancellor, to the extent above expressed, is affirmed.

REPORTS
OF
CASES ARGUED AND DETERMINED

AT JANUARY TERM, 1863.

WILSON *vs.* THE STATE.

[INDICTMENT FOR PERSUADING SLAVE TO LEAVE MASTER'S SERVICE.]

1. *What constitutes offense.*—To authorize a conviction under section 3128 of the Code, it is not sufficient to show that the defendant *advised* the slave to leave the master's service: he must have produced in the slave's mind an intention to leave the master's service; but it is not necessary that he should have a specific intention to induce the slave to leave, nor that the slave should actually leave the master's service.

FROM the Circuit Court of Dallas.

Tried before the Hon. JOHN T. HEFLIN.

THE indictment in this case was found at the November term, 1862, and charged that the prisoner "persuaded a slave named Eliza, the property of Mrs. Susan Gee, to leave the service of her mistress, with the intent to go to a state or country where such slave might enjoy freedom." "On the trial," as the bill of exceptions states, "it was proved that the defendant had used language to the slave named in the indictment, calculated to excite her desire for freedom, and to leave her home; that he had promised to

make her his wife, and to take her to a free state ; had told her that he would take her where she could not be cuffed and kicked by damned southerners, and where she would be treated as a white woman. These are only some of the expressions proved. The language which he used was of the kind which the Code implies in the section under which he was indicted. The ownership of the slave, the name, and the time, were all proved as alleged. But there was, also, evidence tending to show that, at the last interview, the prisoner's object was to obtain an immediate gratification of his carnal appetite. One of the witnesses testified, that the defendant advised the slave to postpone the time of leaving for several weeks, while the slave urged an immediate leaving; while another testified, that she urged the postponement, and he the immediate leaving. There was no proof of any preparation on the part of either to leave. There was proof that the defendant represented himself to the slave as having just come from the Yankee fleet; and there was proof, also, that this representation was false. Two interviews were testified to by the witnesses. One witness testified, that he heard the conversation at the first interview casually, and without the knowledge of the parties. The last interview, which was shortly before day, was made after an arrangement with the slave, by which the witness was allowed to get under her bed, in order that he might hear the conversation when the defendant returned. During this last interview, the defendant repeatedly begged the slave to allow him to go to bed with her then; she kept up the conversation for a while, not appearing to consent, until at last both got into the bed; and the witness, who was under the bed by appointment, thereupon got up, and arrested the defendant. The slave was proved to be of wanton character, and had been kept by white men. Much bad language was used by the prisoner, which is not here set out. There was other evidence, also, which is not stated in this bill of exceptions."

"The defendant asked the court to charge the jury,—

"1. That if they believed, from the evidence, that the

defendant did not wish or intend to get the slave to leave, but used language promising to take her to a free state only with the purpose of inducing her to submit to his embraces, such promises on his part, thus falsely given, were not sufficient to authorize a conviction.

"2. That if the slave knew she was not going to be taken or enticed away, and if the defendant was not intending to take, or entice, or persuade her away, he must be acquitted."

The court refused these charges, and the defendant excepted to their refusal.

No counsel appeared for the defendant.

M. A. BALDWIN, Attorney-General, for the State.

A. J. WALKER, C. J.—The statute under which the indictment in this case was found, is as follows: "Any person who *persuades* any slave to leave his master's service, with the intent to go to a state or country where such slave may enjoy freedom, *although such slave may not leave his master's service*, * * * must, on conviction, be imprisoned in the penitentiary, not less than five, or more than twenty years."—Code, § 3128. This statute is designed to improve an older one, by the insertion of the words "although such slave may not leave his master's service.—Clay's Digest, 419, § 16. The purpose of this change of the previous law was obviously to prevent the escape of those persons who had poisoned the slave's mind, and produced discontent, with a desire for freedom, not followed by an actual departure from service. The legislative mind was influenced by the apprehension, that the class of offenders just described would escape under the construction of the word "persuade" which the courts would adopt. *Persuade* is frequently used as the synonym of *induce*; and it also means to "incline the will," "to prevail upon by argument, advice, expostulations, or reasons."—See Webster's and Worcester's Dictionaries. Adopting the former of those two significations of the

word, the courts would hold, that the inducement of the slave to actually leave his master's service, with the specified intent, was a necessary ingredient of the offense. The adoption of that signification would probably have resulted from an application of the rule which requires a strict construction of criminal statutes. Indeed, the law-books very clearly point to such a construction as the proper one. *Respublica v. Roberts*, 1 Dallas, 39; *Regina v. Rhodes & Cole*, 2 Ld. Raymond, 886-889; 1 Bishop on Cr. Law, § 138.

The word certainly is often used, alike in conversation, and in writing, in the latter of the two senses above stated; and the clause inserted by way of improvement of the old law has precisely the effect of excluding the operation of the word, which the former of the two significations would give it. It is therefore to be inferred, that the legislature designed that the latter meaning should be adopted, and that the act of persuasion should be consummated when the will of the slave was influenced, or, in other words, when an intent in the slave's mind to do the specified thing, with the specified purpose, was produced.

It has been suggested, that "persuades" should be construed to mean "advises"; and that the mere act of advising a slave to leave his master's service, with the intent to go to a state where he might enjoy freedom, would constitute the offense. There are two conclusive objections to such a construction. "Advise" has not the same meaning with "persuade;" and the rules for construing penal statutes do not permit us to strike out any of the necessary requisites to make an offense, as implied from the language used. "Persuade" embraces in its meaning more than "advise"; and we could not treat it as the synonym of "advise," without dispensing with what the word used clearly implies is a part of the offense.

We hold, that the "intent" to leave her master's service, with the intention of going to a state where she might enjoy freedom, is an ingredient of the offense. But a specific intent on the part of the accused to induce her to leave her master's service was not necessary to a conviction.

The general doctrine is, that if a man intends to do what he is conscious the law (which every one is presumed to know) forbids, there need not be any other evil intent. 1 Bishop on Cr. Law, § 252; *Stein v. State*, at January term, 1862. If the defendant in this case intentionally persuaded the slave to leave her master's service, with the intent to go to a state where she could enjoy freedom, he is guilty, no matter whether he intended that she should actually depart from her owner's service or not. Having intentionally done an unlawful act, there need not be any other evil intent. It may be further remarked, that a man is presumed to intend the natural, necessary, and even probable consequences of his acts.—1 Bishop on Cr. Law, § 248. The presumption of a purpose to do the unlawful act would result from the doing or saying of things, the natural, necessary, or probable consequences of which, would be the accomplishment of it; but this presumption is not conclusive, and might be rebutted.

It results from the principles above announced, that the court erred in refusing to give the last charge asked by the defendant; and for that error, the judgment of the court below is reversed, and the cause remanded, that the prisoner may again be tried. The usual order will be made for remanding the prisoner to the appropriate county for trial.

HINDERER vs. THE STATE.

[INDICTMENT FOR EMBEZZLEMENT.]

1. *Who is agent.*—A person who is employed by a post-commissary to superintend a bakery, and whose duty it is to receive all the flour sent to the bakery by the commissary, to have the same made into bread at the bakery, and to deliver the bread on the order of the commissary, may be indicted for embezzlement (Code, § 3143) as the agent of the commissary.

FROM the Circuit Court of Montgomery.

Tried before the Hon. NAT. COOK.

THE indictment in this case charged, "that Fred Hinderer, *alias* Fred Hindree, an agent or clerk of George O. Janney, not being an apprentice, nor under the age of eighteen years, embezzled, or fraudulently converted to his own use, ten barrels of flour, of the value of one hundred dollars, which came into his possession by virtue of his employment." The only plea was, not guilty. "On the trial," as the bill of exceptions states, "the following facts appeared in evidence: The offense charged was committed in Montgomery county, about the 10th November, 1862. About the 1st September, 1862, George O. Janney was appointed post-commissary of subsistence of the Confederate Government in the city of Montgomery. His duty was to receive flour furnished to him by the government, have it made into bread, and distribute it to the troops of the government at that place. To accomplish this, he leased a bakery in said city, paying the rent monthly, and employed persons to make the flour into bread; and he employed the defendant to take charge and superintend the bakery, and the making the flour into bread. All these contracts were made in his own name, and without the knowledge or authority of the government or its officials; and he paid the employees monthly, and the receipts given by them for their pay were given to him as post-commissary of subsistence, being so expressed in them. Under the contract made with Janney, the defendant was to receive all the flour sent by Janney to the bakery, to have the same made into bread at the bakery, and then deliver the bread on the order of Janney; the flour to be received by him at the bakery, and the bread to be delivered by him at the bakery. He kept the keys of the bakery; and the establishment, with the flour and bread while there, was under his exclusive control, subject alone to the directions of Janney. While in this employment, which commenced in September, 1862, he received from

Janney at the bakery, for the purposes aforesaid, ten barrels of flour, which he removed from the bakery secretly by night, and concealed in another house; but none of the barrels was opened, nor was any part of their contents abstracted. One Young obtained permission for him from one Altschief to deposit the flour in his back room, where it was found, covered up with scraps of pasteboard and other things. The prisoner deposited it there in Young's name, because he would be charged storage if it were deposited in his own name. When asked why he took the flour, he replied, that he was not receiving wages enough to support him. Janney testified, that he considered himself responsible to the government for all the flour he received; that whenever he sent any flour to the bakery, he took the defendant's receipt for the same when it was delivered at the bakery; that he made out his accounts with the government, and forwarded them at the end of each month, by mail, with his vouchers, to the proper officer of the government; that said accounts embraced what he paid for the bakery, and to the employees, (including the defendant,) with their names, and the amount paid each; that he had not received any reply in relation to his accounts for September or October, and had not heard whether they had been passed and approved or not. This was all the testimony in the case, and there was no conflict in the evidence. The questions argued before the court and jury were, mainly, whether the defendant was a clerk or agent at all; and if so, whether he was the clerk or agent of Janney, or of the government."

"The court charged the jury, that the defendant might, under the testimony, be the agent or clerk both of Janney and the government; and that if they believed he was the agent of both, and received the flour as the agent or clerk of Janney, to be made into bread, and secretly removed the barrels, with a view to appropriate them to his own use, he was guilty of embezzlement, although he did not abstract any of the flour from the barrels, nor do any thing more than to remove and conceal them.

"The defendant excepted to this charge, and requested the court to instruct the jury :

"1. That if, from the evidence, they entertained a reasonable doubt whether the defendant was the agent or clerk of Janney or of the Confederate Government, then he must be acquitted.

"2. That if, from the evidence, they found that Janney, as post-commissary of subsistence at Montgomery, leased a bakery for the use of the government, and employed persons to work therein for the government, and employed the defendant as a baker for the government, to bake bread for the government troops, Janney's duties being to supply bread to those troops ; and that the officials of the government, who had the proper authority, after full information of what Janney had done, ratified all that he had done—then the defendant was not the agent or clerk of Janney, and could not be convicted under the indictment.

"3. That if, from the evidence, they found that Janney was post-commissary of subsistence at Montgomery, for the Confederate Government ; and that his duties were, to receive flour from the government, and to have it baked into bread, to be supplied to the government troops ; and that, to discharge these duties, he leased a bakery in Montgomery, and employed the defendant to bake bread for the government ; and that Janney paid for the lease, and for the employment of the defendant, and charged it to the government, and forwarded his accounts monthly, by mail, to the proper department ; and that a sufficient time has elapsed for the proper officials to receive and examine his accounts, and they do not object to what he has done,—this is a sanction of what he has done, and their silence is a ratification of what he has done ; and this ratification makes the defendant an agent or clerk of the government ; and that if the offense charged was committed subsequent to the time when said accounts and information were received by the officials aforesaid, and after a reasonable time had elapsed for them to express their objections to what Janney had done, and they had not made any objections thereto, then the defendant cannot be convicted.

"4. That if the evidence showed that Janney, as commissary and agent of the Confederate Government, authorized in the usual course of his business and of the duties of his office, employed the defendant for and on account of the government, to be employed in business which related exclusively to the government, the defendant thereby became the clerk or agent of the government exclusively, and not of Janney, and cannot be convicted under the indictment."

The court refused each of these charges, and the defendant excepted to their refusal.

JNO. A. ELMORE, for the defendant.

M. A. BALDWIN, Attorney-General, for the State.

STONE, J.—The defendant was tried and convicted under section 3143 of the Code, which provides for the punishment of any clerk or agent of any private person, who embezzles, or fraudulently converts to his own use, any property of another, which has come into his possession by virtue of his employment, &c. The only reason urged in this court for a reversal, grows out of the question, was the defendant, under the facts of this case, the clerk or agent of George O. Janney?

Agent, in the sense here employed, means, "one who is authorized to act for another; a substitute; a deputy; a factor."—Worcester's Dictionary; *Brooks v. The State*, 30 Ala. 516.

The objection urged is, that the defendant was the agent of the Confederate States Government, and not of Mr. Janney. We cannot assent to this proposition. Mr. Janney was the post-commissary; and according to the only testimony in the case which bears on this question, "he (Mr. Janney) employed the defendant to take charge and superintend the bakery, and the making the flour into bread. All these contracts were made in his (Mr. Janney's) own name, and without the knowledge or authority of the government, or its officials; and he paid the employees monthly,

and the receipts given by them for their pay, were given to him as post-commissary of subsistence, being so expressed in them." These acts clearly show that the defendant was the employee of Mr. Janney. Do they tend to show that he was the agent of the government? There can be no agency without the corresponding relation of principal.—2 Bish. Cr. Law, § 286. Was the Confederate Government the defendant's principal? The acts of an agent, within the scope of his authority, are the acts of his principal; and the principal is responsible, civilly, for the consequences of negligence, or want of skill in the agent, while performing duties within the purview of the agency. Could these liabilities attach to the Confederate Government, under the circumstances disclosed in this record? Most certainly they could not. As well might it be contended, that the drayman, who, under a contract with the commissary, transports to the latter supplies purchased by him, is the agent of the government, as that this defendant is.

If the defendant had contracted with the government, was to account with the government, or to look to it for compensation, the rule would probably be different. Here, he had no claim upon the government for his compensation, nor were the rates of his wages subject to be controlled or modified by its will. His wages were stationary, and fixed by contract with Mr. Janney; and the latter, if sued for the price, would not be heard to assert his want of authority to make the contract, nor to deny his personal liability upon it. Neither could the defendant, in any event, claim compensation of the Confederate Government.—*Jones v. Dawson*, 19 Ala. 672.

In England, under a statute which strikingly resembles ours in this respect, it was ruled, that a servant in the employment of A. & B., who are partners, is the servant of each; and if he embezzles the private money of one, may be charged under the statute as the servant of that individual partner.—*Rex v. Leech*, 3 Starkie, 70.

In the case of *Regina v. White*, (8 C. & P. 742,) White

was indicted as the servant of one Bricknel. It appeared that Bricknel was one of several proprietors of a stage-coach, running from Birmingham to Hereford, which coach Bricknel supplied with horses from Hereford to Malvern. Bricknel himself was in the habit of driving the coach from Worcester to Hereford, and employed the prisoner to drive for him when he did not go himself. All the proprietors were interested in the moneys received throughout the line; but Bricknel received and held the money taken on that part of the line between Worcester and Hereford, and was accountable to the other proprietors for it. White embezzled funds which came to his hands while driving for Bricknel; and the court ruled that, as between the prisoner and Bricknel, the moneys were received to the use of Bricknel, and that White was the servant of Bricknel.

In the case of *Regina v. Callahan*, (8 C. & P. 154,) the court held, that the prisoner was servant to those persons to whom it was his duty to account, although he was appointed by other persons.

In this case, the defendant received his appointment from Mr. Janney; and there can be no doubt of his liability and duty to account with him for the flour intrusted to his keeping. It came into his possession by virtue of his employment, and the case is thus brought directly within the statute.—*Lowenthall v. The State*, 32 Ala. 595; *People v. Sherman*, 10 Wend. 298; Ros. Cr. Ev. 443-4.

It is, perhaps, not material to inquire, whether the prisoner may not have been also the servant of Mr. Janney. A servant, whenever he is clothed with authority to act, or exercise judgment or control, in the absence of his master, is an agent of the latter.—2 Kent's Com. 622, note; 1 Burrill's Law Dictionary, 73; *Powell v. The State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514. We hold, however, that if Mr. Janney's testimony be believed, the defendant was, in this service, strictly an *agent*. He was employed to take charge of and superintend the bakery. It nowhere appears that he was even a baker, or had anything to do with the baking, further than "to take charge and super-

intend the baking, and the making the flour into bread."

If there be any fault in the affirmative charge, it was too favorable to the prisoner. The bill of exceptions informs us, that it contains all the evidence ; and there is no testimony which tends to show that the defendant was the clerk or agent of the Confederate Government.

The first and second charges asked by the defendant, and refused by the court, were abstract, and should not have been given. The third and fourth charges are in conflict with the principles we have declared above, and were rightly refused.

There is no error in the record, and the judgment of the circuit court is affirmed.

JOE (A SLAVE) vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Admissibility of confessions.*—Where the prisoner, a slave, being tied, and about to be whipped, in the presence of his master and other white men, was asked why he committed the offense with which he was charged, and was told that his punishment would be lighter if he confessed the truth ; a repetition of the confession thus obtained is not competent evidence against him, when it is shown to have been made on the next day, in the presence of his master, in reply to a similar question by the officer who had arrested him, and who was conveying him to jail.
2. *Charge on sufficiency of evidence.*—A charge, instructing the jury "that they must find the prisoner not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt," asserts a correct legal proposition, and should be given at the request of the prisoner.

FROM the Circuit Court of Butler.

Tried before the Hon. JNO. K. HENRY.

THE indictment in this case charged, that the prisoner, who was a slave, by night broke and entered into a dwelling-house, occupied by Mrs. Catherine Crawford, with intent

Joe (a slave) v. The State.

to commit a felony. The evidence against the prisoner was altogether circumstantial. The entrance into the house was effected by raising a plank in the floor. Mrs. Crawford testified, that she was awakened in the night by some one whom, although it was so dark she could not see, she discovered to be a negro by putting her hand on his head; and that she immediately got up, and went to the house of a neighbor. It had been raining during the night; and tracks were discovered in the morning, in the yard, and in the public road, leading in the direction of the plantation on which the prisoner lived. The prisoner was the only grown negro man on the plantation, and his tracks were found, on comparison, to correspond with those found in the road. The State introduced one Pickett as a witness, who testified, that on Monday (the burglary having been committed on Saturday night) he, as constable, in company with the slave's master, went into the field where the negroes were at work, and arrested the prisoner; that he put his hand on the prisoner's shoulder, and told him he must go with him to jail; that the prisoner said, "he was sorry for it;" that he (witness) then called for a rope, and tied the prisoner; that the prisoner's master told him, "he was in a bad fix, and must go to jail;" that the prisoner replied, "he could not help it then;" that as they went along, witness and the prisoner's master riding side by side, and the prisoner walking a little in front of them, he asked the prisoner, "what he went into the house for;" that the prisoner replied, "to get or steal some clothes;" that his master then asked him, "if he supposed he would let him wear clothing which was stolen;" and that the prisoner replied, after hesitating, "that he thought he could wear them at night."

The prisoner objected to the admission of the confessions detailed by the witness Pickett, on the ground that they were not voluntary, and, for the purpose of showing that they were not made voluntarily, adduced the following evidence to the court; "One Robertson testified, that on the morning after the burglary was committed, the men in the

neighborhood collected at the house of Mr. Bush, the prisoner's master, to have an investigation as to what would be best to do with the prisoner; that Bush had him tied to a tree or post near by; that he (witness) went up to the prisoner, and asked him what he went into Mrs. Crawford's house for, and told him he had better tell the truth—that the punishment would be much lighter if he would confess, and that it would be better for him to tell all about it; that the prisoner replied, 'Master, I am not guilty, and if they punish me it will be wrong;' that the crowd soon afterwards took the prisoner, and carried him some distance from the house, and tied him down across a log; that the prisoner, while in this condition, was asked by one of the crowd, in the presence of his master and the others, what he went into Mrs. Crawford's house for, and was told, that the punishment would be lighter if he would confess the truth; that the prisoner then said, that he went in to get or steal some clothing; and that they then whipped him. Bush, the prisoner's master, testified, that his inviolable rule with his slaves was, if any of the grown negroes committed any offense, or disobeyed his orders, to tie them up, and whip them until he made them confess the truth; that he had frequently treated the prisoner in this way; that he seldom whipped his slaves, and never on suspicion only, but, when he knew them to be wrong, he whipped them severely. It appeared, also, that the prisoner was turned loose after the whipping on Sunday." On this evidence, the court refused to exclude from the jury the confessions made to the witness Pickett; to which the prisoner excepted.

The prisoner asked the court to instruct the jury, "that they must find the prisoner not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt." The court refused this charge, and the defendant excepted to its refusal.

M. C. LANE, for the prisoner.

M. A. BALDWIN, Attorney-General, for the State.

STONE, J.—[1.] The confessions given in evidence in this case against the prisoner's objections, were clearly inadmissible under the rule laid down by this court.—See *Bob v. The State*, 32 Ala. 266, and authorities cited.

[2.] The charge asked should also have been given.—See *Mose v. The State*, 36 Ala. 211, and the criticism of the language of the charge, pp. 230–1.

The other questions argued are not raised by the record, and we need not consider them.

Reversed and remanded, and the prisoner will remain in custody until discharged by due course of law.

FOSTER vs. THE STATE.

[INDICTMENT FOR TRADING WITH SLAVE.]

1. *Sufficiency of recognizance; limitation of prosecution.*—An indictment for selling liquor to a slave. "whose name and whose owner are unknown to the jurors," although fatally defective on demurrer, contains a sufficient description of the offense charged to uphold a recognizance, based thereon, for the appearance of the defendant at the next term to answer a new indictment; and if a new indictment is found at the next term, although after the lapse of twelve months from the commission of the offense, (Code, §§ 3374, 3376,) the statute of limitations is no bar to the prosecution.

ERROR from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

The indictment in this case, which was found at the February term, 1861, charged, "that Nancy Foster did sell, give, or deliver, to a slave named Moses, belonging to James Chapman, vinous or spirituous liquor, without an order in writing," &c. The defendant pleaded not guilty, and the statute of limitations of twelve months; and issue was joined on these pleas. On the trial, as the bill of exceptions shows, the State proved, that the offense charged

was committed in December, 1859; and that at the March term, 1860, an indictment was found against the defendant, which charged, that she "did sell, give, or deliver, to a certain male slave, whose name and whose owner are unknown to the jurors, vinous or spirituous liquors, without an order in writing," &c. The former indictment was read in evidence, "and also a judgment entry in relation thereto, made at the August term, 1860," in the following words:

<p>"The State vs. Nancy Foster.</p>	}	<p>August 21, 1860. This day came the State, by its solicitor, and the defendant in person, who, by attorney, demurs to the indictment; which demurrer was sustained by the court; and the defendant refusing to allow the indictment to be amended, it is ordered by the court, that this prosecution be <i>not-prossed</i>, and that the defendant be recognized, in the sum of two hundred dollars, for her appearance at the next term of this court, to answer a new indictment. And now, in open court, come John M. Philips, Walter A. Weems, and George C. Huguely, and consent to be recognized, in the sum of two hundred dollars, for the appearance of the defendant at the next term of the court."</p>
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"On the foregoing evidence, the court charged the jury, that, if they believed the evidence, the statute of limitations was no bar or defense to the prosecution. The defendant excepted to this charge, and requested the court to instruct the jury, that although they might believe, from the evidence, that an indictment was found against the defendant at the March term, 1860, and that the same was *not-prossed* by the court, and the defendant ordered to give bond for her appearance at the then next term of the court, to answer an indictment to be preferred against her, and that another indictment has been found at this term of the court; yet, if it is not proved that this indictment is for the same offense for which the other indictment was found, and if the jury believe, from the evidence, that the offense was not committed within one year before the finding of this indictment, they must find the defendant not

guilty. The court refused this charge, and the defendant excepted to its refusal."

The charge given by the court, and the refusal of the charge asked, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for the plaintiff in error. As the offense proved on the trial was committed more than twelve months before the indictment was found, the prosecution was clearly barred by the statute of limitations, unless the case falls within some exception to the general rule. But neither of the statutory exceptions relied on is applicable. Section 3530 of the Code applies only to cases of variance—that is, actual misdescription—and does not include the mere omission of necessary allegations. Section 3532 is confined to two specific classes of cases: (1st) where the judgment is arrested, and (2d) where the indictment is quashed; neither of which is the case at bar. Section 3376 does not apply, because the record does not show that the defendant was "bound over" to answer a new indictment: it simply shows that she was "ordered to be recognized," and that three other persons thereupon appeared, "and consented to be recognized for her appearance." This wholly fails to show a recognizance by her, and would not support a *scire facias* or forfeiture against her.

M. A. BALDWIN, Attorney-General, for the State, contended that the case fell within the provisions of sections 3530, 3532, and 3376 of the Code.

STONE, J.—The only defense relied on in this case, is the twelve months statute of limitations in the prosecution of misdemeanors.—Code, § 3374. The bill of exceptions recites, that the offense was committed in December, 1859; that at the March term, 1860, the grand jury of the proper county found a true bill, charging that Nancy Foster "did sell, give, or deliver, to a certain male slave, whose name and whose owner are unknown to the jurors,

vinous or spirituous liquor, without an order in writing," &c.; that at the August term, 1860, a demurrer to this indictment was sustained by the court, and the defendant ordered to be "recognized, in the sum of two hundred dollars, for her appearance at the next term of this court, to answer to a new indictment;" and that thereupon she was so recognized, with her three sureties. The indictment on which the defendant was tried, was found at the February term, 1861, and charged, that the defendant "did sell, give, or deliver, to a slave named Moses, belonging to James Chapman, vinous or spirituous liquor, without an order in writing, signed by the owner or master of such slave," &c.

The Code (section 3376) declares, that "a prosecution may be commenced, within the meaning of this chapter, by the issue of a warrant, or by binding over the offender." Although the first indictment was defective, in this, that it did not sufficiently describe the slave to whom the alleged sale was made, (see *Francois v. The State*, 20 Ala. 83;) still the description therein contained was sufficiently specific to uphold the defendant's recognizance, based thereon, to appear at the next court, and answer to a new indictment. The judgment entry, the recognizance, and the indictment first found, must all be construed together; and thus construed, they sufficiently point to the indictment which was found at the February term, 1861. "It is not required that the recognizance should set forth with technical accuracy the indictment which the State may exhibit against the offender. This cannot well be done. But the offense for which the party is recognized to appear may be stated in general terms."—See *State v. Weaver*, 18 Ala. 297; *Williams v. State*, 20 Ala. 63; *State v. Eldred*, 31 Ala. 395; *Vasser v. State*, 32 Ala. 586.

It being thus shown that this prosecution was commenced, by "binding over the offender," in August, 1860, it is clear that the statute of limitations could not avail the defendant. The circuit court did not err in the charge given, nor in the refusal to charge as asked.

We need not inquire whether this case is brought within

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the influence of section 3532 of the Code.—See *Rex v. Wheatly*, 2 Burr. 1127; 5 Bac. Abr. 94; *Rex v. Johnson*, 1 Wilson, 325; *Rex v. Inhabitants of Hilton*, 1 Salk. 372; *Leyton's case*, Cro. Car. 584; *King v. Wynn*, 2 East, 226; *Rex v. Webb*, 3 Burr. 1468; *U. S. v. Cooledge*, 2 Gallison, 364; *Reynolds v. Bell*, 3 Ala. 57; *Massey v. Walker*, 8 Ala. 167; *Ellison v. Mounts*, 12 Ala. 472; *State v. Krebs*, 8 Ala. 951; *State v. Dunham*, 9 Ala. 76; *Willingham v. State*, 14 Ala. 539; *State v. English*, 2 Missouri, 182; Whar. Am. Cr. Law, § 523; 1 Arch. Cr. Pl. 102, note 1.

Judgment affirmed.

EX PARTE HILL, IN RE WILLIS, JOHNSON, AND REYNOLDS, vs. CONFEDERATE STATES.

[APPLICATION FOR PROHIBITION TO PROBATE JUDGE.]

1. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer.*—The courts and judicial officers of the State have no jurisdiction, on *habeas corpus*, to discharge from the custody of an enrolling officer of the Confederate States, on the ground of physical incapacity for military service, persons who have been enrolled as conscripts under the several acts of congress.
2. *When prohibition lies.*—Where a probate judge has granted the writ of *habeas corpus* to an enrolled conscript, whose petition for the writ shows on its face that said judge has no jurisdiction to inquire into the validity of his enrollment, a prohibition will be awarded by the supreme court, without a previous application to the circuit court, enjoining further proceedings by the probate judge; and the application for the writ may be made by the enrolling officer who has the custody of the conscript.
3. *Constitutionality of conscript laws.*—The several acts of congress, commonly called the "conscript laws," (C. S. Statutes at Large of 1st Congress, 1st session, p. 29; *ib.* 2d session, p. 61,) are constitutional. (Per STONE, J.)

APPLICATION by L. H. Hill, an officer in the provisional army of the Confederate States, and the enrolling officer of the district including the county of Montgomery, for writs

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of prohibition, to be directed to the probate judge of said county, enjoining and restraining him from further proceedings in the matter of the petitions of Asa J. Willis, E. P. Johnson, and Calvin Reynolds, respectively, for the writ of *habeas corpus*, by which said petitioners sought to obtain their discharge from the custody of said enrolling officer.

The application was made on a regular motion day, during the January term, 1863; present, Hon. A. J. WALKER, C. J., and STONE, J. The opinion of Chief-Justice WALKER was pronounced on the 4th March, 1863, and an opinion was pronounced by Justice STONE a few days afterwards; but the latter opinion was subsequently withdrawn, and that herewith published was substituted in its stead.

The case was argued at the bar, by P. T. SAYRE, on behalf of the Confederate States, and by S. F. RICE and JNO. A. ELMORE, with whom was A. B. CLITHERALL, for the petitioners in the court below. No brief or memorandum of their arguments has come to the hands of the Reporter.

A. J. WALKER, C. J.—Three persons, who were taken and detained in custody under the conscript law by the enrolling officer, severally petitioned the probate judge for writs of *habeas corpus*, predicated their prayers for a discharge upon the ground of exemption from conscription on account of physical disability; and the writs were awarded by that officer. The enrolling officer, contending that the judicial tribunals of the State have no jurisdiction over the matter of his detention of those persons as conscripts, now applies to this court for writs of prohibition. Thus the duty devolves upon this court, of deciding whether a State tribunal has authority to discharge one who has been taken and is detained by the enrolling officer as a conscript, upon the ground of his exemption for the reasons above stated.

The first section of the act of congress, approved April 16, 1862, authorizes the president to call out and place in the service of the Confederate States men between the ages of

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eighteen and thirty-five years, who were not legally exempted from military service. The amendatory act of the 27th September, 1862, in language similar to that employed in the original law, extends the authority to men between the ages of thirty-five and forty-five; and requires the president, if he should not call out all the persons between the specified ages, to discriminate, by limiting his call to persons of some particular age under forty-five. By an act approved 21st April, 1862, certain descriptions of persons were exempted from enrollment for service in the armies of the Confederate States. That act was repealed by one adopted on the 11th October, 1862, which exempts "from military service in the armies of the Confederate States" various classes of persons therein described.

The two acts of 16th April and 27th September impose upon the authority to conscribe a restriction to persons not legally exempted. The persons exempt are not described by name, but by classes, defined by reference to bodily or mental incapacity, to the incumbency of certain offices, the practice of certain useful arts, the profession of some specified religious creeds, and other distinguishing peculiarities. As the authority to conscribe does not extend to the individuals who compose those classes, it can only be exercised by ascertaining the persons to whom the peculiarities distinguishing the different classes pertain. The ascertainment of the legal subjects of conscription is an unavoidable step in the proceeding. Inquiry and decision, upon this point, are necessarily involved in the exercise of the president's power to conscribe all within the prescribed ages, "who are not legally exempted from military service."

The selection from the community at large of the subjects of conscription, involving inquiry and decision as to the *status* of every man, was obviously susceptible of accomplishment by the executive department of the government, only through the agency of officers clothed with the requisite authority. Congress therefore has authorized the appointment of such officers. By the third section of the act of 16th April, 1862, the president is empowered to ap-

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point officers, charged with the duty of enrolling conscripts, "*in accordance with rules and regulations to be prescribed by him.*" A later act, approved 8th October, 1862, directs, that enrollments shall be made *under instructions from the war department*, and reported by the enrolling officer. Furthermore, an act, approved October 11th, 1862, authorizes the assignment of one or more surgeons to the duty of examining those enrolled; and declares, that the decision of such surgeon or surgeons, "*under regulations to be established by the secretary of war,*" as to physical and mental capacity, *shall be final.*

The employment of appropriate officers to execute the conscript law, is thus clearly authorized. Every act of conscription by such officers must be done pursuant to a decision based upon an inquiry, in which the hearing and weighing of evidence must often, if not always, be necessary. Without an inquiry and judgment as to the liability to conscription, no enrollment could be made, because it could not otherwise be determined who were subject to conscription. This authority to inquire and decide is not, however, left to implication from the nature of the act. There is an express authority to decide upon the question of exemption on account of mental or physical incapacity, and the decision of the tribunal designated is made final. The existence of such authority is clearly indicated in the phraseology of the law, declaring that "*all persons who shall be held unfit for military service in the field, by reason of bodily or mental incapacity, under the rules to be prescribed by the secretary of war,*" shall be exempt. The *holding* or deciding persons to be unfit for military service, under rules prescribed by the secretary of war, must be by the officers appointed to execute the law. The authority to hear evidence and decide, is a plain inference from the provision in the act of 11th October, 1862, that the claim of certain classes of artisans is to be supported by affidavit, which shall only be *prima-facie* evidence of the facts stated. Furthermore, the general idea, that the power of investigation and decision is a part of

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the authority to be exercised by the respective officers, is very clearly brought to view in the clause of the same act, which requires the secretary of war, upon evidence, to judge whether the exempted artisans have, by their conduct, forfeited the privilege. It must be noted, too, that the duties of the officers are to be discharged under rules and regulations to be prescribed by the secretary of war. Surely, these rules and regulations are not contemplated to be merely the guides of the subordinate officers, in performing the acts of writing down the names of the conscripts, and taking charge of them. They were destined to control and direct them in the higher, more important, and more difficult office of inquiring and judging as to the liability to conscription. The execution of the law is utterly impracticable, if there be no authority to ascertain and judge who are the legal subjects of conscription. With the utmost confidence, I assert the proposition, that the officers employed in the execution of the law are clothed with authority to judge what persons fall within its operation. The exercise of this authority is an official duty, to be performed under the guidance of rules prescribed by the secretary of war.

A State judge, in discharging one taken as a conscript, upon the ground that he was not legally liable to conscription, would supervise and control an officer of the Confederate States, in the performance of an official duty, and in the exercise of a legal authority. He would, furthermore, annul the decision which such officer was authorized to make, and abrogate the enrollment based upon that decision. The decision of the question of amenability to conscription is within the scope of the authority exercised. An incorrect decision would be an erroneous exercise of a subsisting authority—not a mere usurpation. The officer is perfectly within the limit of his authority, when he investigates and decides; and, though he may err, he is not an usurper. Neither the absolute invalidity of the conscription, nor a liability in trespass, would result from an incorrect decision.—*Duckworth v. Johnson*, 7 Ala. 578;

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Savacool v. Boughton, 5 Wend. 170; *Easton v. Calender*, 11 *ib.* 90.

The principle is illustrated in the case of a justice, erring in the exercise of his authority to commit offenders; and of assessors, who incorrectly decide that a given person belongs to a class liable to be taxed. The levy of a *fieri facias* by a marshal of the Confederate States, upon property not belonging to the defendant, does not present an analogous question. He is simply authorized by the process to do a particular thing. He is not called upon by the law to decide anything. He has none of the attributes of a tribunal armed with authority to investigate and decide questions. His judgment, of course, he exercises, in determining whether the property upon which he levies belongs to the defendant; but, upon a principle of public policy, he decides at his own peril. The exercise of his judgment is for his own protection, and not by authority of law. His process authorizes him to levy upon the defendant's property—not to adjudge the question of the title to property. It neither requires him to construe a law, nor to decide upon evidence as to the cases that come within its operation. The law under which he acts, and which governs him, unlike that under which the enrolling officer acts, has not deemed it necessary to bestow authority for an investigation and *quasi-judicial* decision, preliminary to his action; but, in requiring him to act at his own personal peril, has expressly repudiated such an idea. No act of congress prescribing a marshal's authority, nor any construction thereof, can be drawn in question in a suit against him, for the levy of process against one, upon the property of another. The simple inquiry, in such a suit, would be, whether the particular chattel, under the general law governing property, belonged to the one person or the other; while at every step in the cases now before us, the court must expound the act of congress marking out the authority of the officer. The decisions, therefore, as to the power of the State courts over the United States marshals, erring in the execution of their process, have no bearing

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upon the question before us. The same distinction applies to an arrest of one person, by virtue of process against another.—*Bruen v. Ogden*, 6 Hals. 370; *Dunn v. Vail*, 7 Mar. La. 416; *Slocum v. Mayberry*, 2 Wheaton, 1.

The officer charged with the execution of the conscript law, not only has authority to investigate and decide, but he is required to do so according to regulations prescribed by the secretary of war. The question of these cases, then, is narrowed down to this: can a State judge, by writ of *habeas corpus*, supervise, control, and annul the act of officers of the Confederate States, done in the exercise of authority given by the law of that government, and required to be done under regulations prescribed by the secretary of war?

It is proper to approach the interesting question above stated, by an observation in reference to the relation existing between the government of the Confederacy and the government of the several States which compose it. The government of the Confederacy possesses the powers delegated by the constitution; and the States retain their original powers, except so far as they may be affected by the grants or prohibitions of the constitution of the Confederate States. While the Confederate government exists by virtue of delegated authority, its powers, within their appropriate boundary, are not subordinate to those of the States. On the contrary, it is expressly declared in the constitution, that the constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made under the authority of the Confederate States, shall be the supreme law of the land. The authority of all governments must be exercised, and must reach the subjects of its operation, through the agency of officers. The officers of the Confederate States, and of the several States, must exercise their functions, and apply the authority of their respective governments, within the same territorial area. It is the clearest deduction of reason, that the officers of neither of these distinct powers, operating within the same territorial limits, and performing proper functions,

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can be subordinated to the other, except as authorized by the constitution, without detriment to the harmonious working of our complicated system, and peril to the rights and benefits which that system was designed to secure.

The analogy (in all respects which concern our subject) between our government and that of the United States enables me to draw from the history of the past an illustration of the idea which I am striving to develop. The fugitive-slave law was passed to protect and maintain a clear constitutional right of a class of citizens in the United States, whom the fluctuations of time had localized in less than a moiety of the States. In most of the other States, an antagonism of sentiment to that right gradually intensified into fanaticism, and extended to the persons to whom the right appertained. A right of subordinating the authority of the officers deputed to execute that law, to the control of local State tribunals, infected by the feeling prevalent in those States, was asserted and maintained.— In many localities, the execution of the law was, by this means, prevented; and the just claim of the people of the slaveholding States, to the maintenance of a constitutional right, was defeated. The powers of the Confederate government are given to it for the benefit and protection of all the people in all the States; and the historic lesson teaches us, that the execution of the laws, passed by virtue of those powers, can not be safely left to the control of local tribunals. The absence of the danger, under our system, can only be argued by arrogating to ourselves a freedom from the frailties of human nature.

The supreme court of the United States, faithful to the constitution, while every other branch of the government seemed to conspire its overthrow, through its venerable and illustrious chief-justice, announced an opinion upon the assumption by the court of Wisconsin of the authority to thwart the execution of the fugitive-slave law in that State. The case was *Ableman v. Booth*, and *The United States v. Booth*, reported in 21 Howard, 506. The entire opinion seems to have had the approval of each one of the nine

judges composing the court ; which was rarely the case, where questions of constitutional law were presented. In that opinion it is said : "The powers of the general government, and of the State, although both exist, and are exercised, within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge, or a State court, as if the line of division were traced by landmarks and monuments visible to the eye." In this extract, and in other parts of the opinion, the proposition is maintained, that neither government can pass the line of division between their respective powers ; and the court further asserts, that the United States marshal, after legally showing his authority to the State tribunal, would be bound to resist its further interference. The practical effect of the law, as declared in that case, is, that a State court or officer has no right of control over the conduct of the officers of the general government, in the exercise of an authority bestowed by its law.

Nor was this principle, when announced in the case above named, at all new in the jurisprudence of the United States. I avail myself of Chancellor Kent's condensation of the decisions upon that subject, and of the authority of his great name, in behalf of my argument, in the following extract from his Commentaries : "*No State can control the exercise of any authority under the Federal government.*" The State legislatures can not annul the judgments, nor determine the extent of the jurisdiction, of the courts of the Union. This was attempted by the legislature of Pennsylvania, and declared to be inoperative and void by the supreme court of the United States, in the case of *The United States v. Peters*, 5 Cranch, 115. * * * * It has also been adjudged, that no State court has authority or jurisdiction to enjoin a judgment of the circuit court of the United States, or to stay proceedings under it. This was attempted by a State court in Kentucky, and declared to

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be of no validity by the supreme court of the United States, in *McKim v. Voorhies*, 7 Cranch, 279. No State tribunal can interfere with seizures of property, made by revenue officers under the laws of the United States; nor interrupt, by process of replevin, injunction, or otherwise, the exercise of the authority of the Federal officers; and any intervention of State authority, for that purpose, is unlawful. This was so declared by the supreme court, in *Slocum v. Mayberry*, 2 Wheat. 1. Nor can a State court issue a *mandamus* to an officer of the United States. This decision was made in the case of *McClung v. Silliman*, 6 Wheat. 598; and it arose in consequence of the supreme court in Ohio sustaining a jurisdiction over the register of the land-office of the United States, in respect to his ministerial acts as register, and claiming a right to award a *mandamus* to that officer, to compel him to issue a final certificate of purchase. The principle declared by the supreme court was, that the official conduct of an officer of the government of the United States can only be controlled by the power that created him. If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But, if there be no jurisdiction in the instance in which it is asserted,—as if a marshal of the United States, under an execution in favor of the United States, against A, should seize the person or property of B,—then the State courts have jurisdiction to protect the person and property so illegally invaded; and it is to be observed, that the jurisdiction of the State court in Rhode Island was admitted by the supreme court of the United States, in *Slocum v. Mayberry*, upon that very ground.”—1 Kent’s Com. 409–10–11. See, also, *McNut v. Blund*, 2 How. 17.

As the officers authorized to execute the conscript law, have jurisdiction to examine evidence, and decide upon the question of amenability to conscription, the authority of Chancellor Kent, as exhibited in the foregoing extract, is

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wholly opposed to the jurisdiction claimed for the probate judge in these cases. Judge McLean, of the supreme court of the United States, holding a circuit court in Indiana, in a charge to a jury trying a case wherein a master sought to recover damages for the taking of his slaves from his custody under a *habeas corpus* issued by a Michigan court, held, that a State tribunal could not release from custody persons held under the authority of the United States, and procured from the jury a verdict for the full measure of the master's damages.—*Norris v. Newton*, 6 McLean, 92. Judge Nelson, of the supreme court of the United States, in a charge to the grand jury, maintained the same doctrine in 1851.—*Hurd on Habeas Corpus*, 198. Judge Cheves, of South Carolina, in a learned opinion reported in the 12th vol. Niles' Register, declined to take jurisdiction over the matter of the discharge of one imprisoned under process issued by the authority of the United States; and the recorder at Charleston has recently followed the principle of that decision, in refusing to interfere under a writ of *habeas corpus* with the detention in the army of an infant only sixteen years of age; maintaining, that the precedent set by Judge Cheves has since been acquiesced in as a correct exposition of the law in South Carolina.—*Ex parte Rhodes*, 12 Niles' R. 264; *In the matter of Benjamin Sauls*, Charleston Courier of 20th October, 1862. In the State of New York, speaking for himself, and not as the organ of the court, Chancellor Kent laid down the principle more recently asserted in the case of *Ableman v. Booth*.—*Ex parte Ferguson*, 9 Johns. 239. It appears, however, that this opinion never controlled the action of the New York courts; for they seem to have since exercised the controverted jurisdiction.—*Ex parte Stacy*, 10 Johns. 328; *Carlton's case* 7 Cow. 471; *United States v. Wynnall*, 5 Hill, 16.

There are several decisions by State courts, which hold that they have power to discharge persons improperly imprisoned under the authority of the United States, or even under its process.—*Almeida's case*, 12 Niles' Reg. 415; *Rockington's case*, 5 Hall's Law Journal, 301; *Common-*

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wealth v. Fox, 7 Barr, 336 ; *State v. Dimick*, 12 N. H. 194 ; *Commonwealth v. Harrison*, 11 Mass. 63 ; *The State v. Brearly*, 2 South. 555. Several of these cases pertain to the question of the discharge of soldiers, enlisted during their minority, by contracts which the act of congress declared void. I will not pause to inquire, whether they are not distinguishable from these cases ; for, if analogous, I am not willing to follow them. They were decided before the supreme court of the United States made its decision in *Ableman v. Booth*, herein before noticed. I cannot reconcile with sound principle, or real expediency, the proposition, that an officer of the Confederacy, when engaged in the execution of an act of congress, and acting within the sphere of his authority, can be subject to the control of the judicial tribunals of the States. It is natural that the judicial mind should approach a question which concerns the liberty of the citizen, with a profounder solicitude, and a more sensitive delicacy ; nevertheless, the principle is the same, when the authority of the government touches the property of the citizen, as when it touches his person. And the same doctrine which gives to the State tribunals a power to supervise such official action as concerns the liberty of the citizen, must subject to the arbitrament of the humblest State officer, clothed with judicial authority, the regularity and legality of the acts of all the officers of the government, whose functions reach the property or money of the people. The power of taxation, of collecting the customs, of regulating foreign commerce and commerce between the States, of restoring fugitive slaves, of raising and supporting armies, and all the other powers of government, would be exercised by its officers under its authority, subject to the controlling interference of the local tribunals, within the jurisdiction of which the power should chance to be in process of execution. Authority conferred by all the States, to be exercised by a government in the administration of which all the people and all the States, directly or indirectly, participate, would be admeasured and regulated by the tribunals of particular localities. A

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law for the raising of revenue, or of armies, might receive the acquiescence and prompt obedience of a majority of the States ; while a minority, by aid of their courts, utterly thwarted its execution within their limits. Thus a burden, designed to be common, would become partial. And a clash of authority between the States and the Confederate government would lead to disastrous results.

The officers, executing the law of conscription, are required to act under rules given them from the war department. Guided by those rules, the officers may attain a conclusion altogether variant from that which a State judge, either uninformed as to those rules, or not recognizing their obligation upon him, would attain. I presume, that those who argue the subordination of the Confederate officers to the State tribunals, would repudiate the idea of the government of those tribunals by regulations of the war department ; for the argument which maintains a supervisory authority over the subordinate officer would as well apply to his superior. Are we, then, to have an officer, obligated by rules and regulations from the war department, subject to the supervision and control of another, who is not bound to an observance of them ? Are we to have an officer convicted as a usurper, and made amenable to damages as a trespasser, who has acted correctly according to regulations which govern him, but who is to be tried by a tribunal not recognizing them ? These inquiries suggest a very conclusive argument against the assumption of State authority in these cases.

I do not controvert the right of State courts to interpret the constitution, treaties, and laws of the Confederate States, and to treat as nullities all laws infringing the constitution, in cases over which they have jurisdiction. The point of my argument is, that these cases are without the jurisdiction of the probate judge, and he cannot adjudge anything concerning the rights of the parties.

Nor do I controvert the general proposition, that the courts of the States have concurrent jurisdiction over all subjects cognizable in the courts of the Confederate

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States, when it is not otherwise provided by law. But I think, that the general rule must be taken with the exception of those cases in which the execution of the laws of the Confederate States by its officers is to be supervised and controlled.

I am not unmindful of the argument *ab inconvenienti*, which has been made. It may be, that access to a judicial officer of the Confederate States would, at present, be inconvenient; but, if so, it is an evil which could easily be avoided, by an act of congress increasing the number of officers, and adjusting their locations with a view to the convenience of the people. The postponement of this duty by congress can not justify us in the abandonment of a principle, or in the setting of a pernicious precedent. Moreover, it must be observed, that the government of the Confederate States has not been so unmindful of the liberty of the citizen, as to leave it to the irrevocable decision of the subordinate enrolling officer. On the contrary, an appeal to the commandant of conscripts, and thence to the secretary of war, is provided by the regulations prescribed for the officers employed in the execution of the law; and I presume the appeal could be extended to the president himself. I am not prepared to admit, that this succession of officers does not afford a reasonable assurance of the maintenance of justice, right, and law. At least, no one can justly complain that no remedy against an erroneous decision is provided, until he has tested those which the government extends to him. And besides all this, a resort may be had to the judge of the court of the Confederate States. The government of the Confederate States was organized by the States, and its laws have been passed and its officers selected, directly or indirectly, by the States and the people; and it should have the generous confidence and the manly support of the country, in the present struggle for independence and liberty.

If it be true that, at common law, the facts alleged in the return to a *habeas corpus* can not be contested; and if no remedy for that vice in the law had been provided, the

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blame would be due to the State government. But in fact, in this State, and in all the other States of the Confederacy, as far as our examination has been extended, there is an express provision for the contestation of the return.—Code, § 3732. If, therefore, a false return should be made, that the petitioner was held by a duly appointed officer by competent authority, it would be the duty of the probate judge to hear a contestation of the return, and not to remand the prisoner if the return was false. In these cases, the petitions themselves, when properly construed, show the want of jurisdiction in the probate judge; and it was his duty to have rejected them *in limine*.—Ex parte *Tobias Watkins*, 3 Peters, 201.

[2.] The cases of Ex parte *Burnett*, 30 Ala. 461, and Ex parte *Smith*, 23 *ib.*, are deemed conclusive authority in favor of the right to apply to this court for a prohibition, without a previous application to an inferior court. The probate judge, in granting the *habeas corpus* upon the petitions, exercised an authority that did not belong to him; and there is no other remedy than the writ of prohibition. It is clear, therefore, that that writ is the proper remedy. Ex parte *Morgan Smith*, 23 Ala. 94; Ex parte *Walker*, 25 Ala. 81; Ex parte *Greene & Graham*, 29 Ala. 52. The petitioner for the prohibition is the party whose custody of the conscript is interfered with, and we think he may make this application.

If we have the facts of these cases correctly presented to us in the petitions, the foregoing opinion is decisive of them. But, as the facts do not appear of record, we deem it the safer course to issue a rule *nisi* to the probate judge. 3 Blacks. Com. 113-14.

STONE, J.—Three several petitions for *habeas corpus* were presented to judge of probate of Montgomery county, by the petitioners, Asa J. Willis, Edward P. Johnson, and Calvin Reynolds; each alleging that he was held a prisoner in custody by the enrolling officer, under the claim and pretense that he, the petitioner, was liable to do mili-

tary duty; while each petitioner averred in his petition, that he was advised and believed he was exempt from military service in the field, by reason of physical incapacity; each petition setting forth the particular disease which, it was alleged, operated the exemption. In neither of said petitions is it averred, that the petitioner has been examined by an *examining surgeon*, or *board of examination*; nor is it averred that he has been *held unfit for military service in the field, by reason of bodily incapacity or imbecility*. On the contrary, it is obvious from the face of each petition, that the applicant seeks enlargement, not on the ground that *he has been held* unfit for military service, but that he is in fact unfit to perform such service, by reason of bodily incapacity; which fact he seeks to establish by evidence on the trial of the *habeas corpus*.

The judge of probate issued writs of *habeas corpus* in the several cases; and the enrolling officer, denying the jurisdiction of the judge of probate in the premises, prays for writs of prohibition, directed to that officer, commanding him to surcease from the further exercise of such authority. The question is thus presented, has the judge of probate jurisdiction of the cases made by the several petitions? I hold, that he has not; and I shall proceed, as briefly as I can, to state the reasons which lead my mind to this conclusion.

The Confederate government, being engaged in war, has the unquestioned right to call the male residents of the Confederacy into the service. "As war can not be carried on without soldiers, it is evident," says Mr. Vattel, "that whoever has the right of making war, has also naturally that of raising troops."—Page 294. "Every citizen is bound to serve and defend the State as far as he is capable."—*Ib.* "No person is naturally exempt from taking up arms in defense of the State, the obligation of every member of society being the same."—*Ib.* Allegiance, or the duty to defend the State when assailed, is correlative to protection. The government owes the latter to the citizen; the citizen, the former to the government.—1 Blacks.

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Com. 369; *Case of Isaac Williams*, 2 Cranch's Rep. 82, in note.

The acts of congress, known as the "conscript laws," are constitutional. The constitution of the Confederate States (art. 1, sec. 8, sub-divisions 11, 12, 13, 14) confers on congress the power "to declare war," "to raise and support armies," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces." These are specific grants of power, in language free from ambiguity; and in neither of the clauses quoted, is found a word or syllable, which defines the mode or manner of executing the power. The same clause which gives the power to raise armies, gives also the power to support armies. The two words are coupled together by the copulative conjunction; and if the one power require the agency of State authority for its execution, by every sound canon of construction, the other power must equally require such agency. I go further: All the grants of power in the 8th section of the 1st article of the constitution (seventeen that are specific, and one general in its terms) are one continuous sentence, each clause being expressed in phraseology of kindred character; and if congress cannot directly execute the powers enumerated above, neither can that body directly execute the other powers therein granted. Now, when we reflect that, among the enumerated grants found in that section and sentence, are the power "to lay and collect taxes, duties, imposts and excises," "to borrow money on the credit of the Confederate States," to "regulate commerce with foreign nations," "to coin money," "to declare war," &c., surely no one can, with any plausibility, contend, that these several powers can only be exercised through State instrumentality.—*Prigg v. Commonwealth*, 16 Pet. 616.

The 16th clause of the section of the Confederate constitution which I am considering, contemplates that the *militia*, which constitutes the material out of which armies are to be raised, may be kept in a state of organization and discipline; and, inasmuch as invasions or insurrections

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may be suddenly precipitated upon us, or the execution of the laws of the Confederate States may be resisted in force, so as to require prompt and vigorous measures for the defense of the country and the welfare of society, congress is also empowered, by the 15th clause, "to provide for calling forth the militia." This is a separate clause, distinct from the authority to raise armies, and was deemed a necessary reserve to meet exigencies, in a country which revolted at the idea of large standing armies, or splendid military establishments in times of peace. The militia, for exigencies; the army, when war has become an established fact.

It being thus shown, as I think, that congress is clothed with power to raise armies by direct means, without calling to its aid State authority, it follows irresistibly, that congress is the sole arbiter of the means and machinery it will adopt for executing this power; with the well known limitation, that the means employed shall be both necessary and proper for carrying into execution the granted power; that is, as I understand this clause, that both qualifying words shall have operation and effect; *necessary* to the full enjoyment of the right; and *proper*—homogeneous and harmonious with our compound system of government. No matter how necessary the proposed means may appear, still, if it antagonize any of the reserved rights of the States or of the people, or militate against any of the principles which underlie our liberties, then it is not proper; and, on the other hand, if the means proposed be in harmony with every principle of our institutions, but not necessary to the full enjoyment of some power granted to the Confederate government, the employment of such means by that government would be a sheer usurpation. When I speak of incidents to the grants of power to the Confederate government, I mean express grants; for there should be no incidents to incidental powers.—See Federalist, No. 33.

The magnitude of the war that is being waged against us, renders it necessary that the government put forth its

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greatest strength for the protection of our liberty and our property. This, I am satisfied, could not be accomplished by any means short of compulsory enrollment; and hence I hold, that the conscription acts are constitutional.

Various officers, agencies, rules and regulations, are necessary and proper instrumentalities in carrying into effect the expressly delegated power "to raise armies." Hence, these means are also constitutional; that is, they are necessary, and are not incompatible with the reserved rights of the States, or of the people. Many of these agencies, trusts and duties, require professional skill and knowledge, which can not be looked for in persons who have not had the advantages of military training and experience; and it was very natural that the government of the Confederate States should take to itself, and to officers of its own appointment, the determination of questions requiring such professional skill.

We have two acts of congress for the conscription of the citizens, one approved April 16th, 1862, (Statutes at Large, first session of first Congress, p. 29;) the other approved Sept. 27, 1862, (Stat. at Large, second session of first Congress, p. 61.) Each of these statutes authorizes the president to call out, and place in the army, all white men who are residents, between the ages specified, "who are not legally exempted from military service." Neither of them defines what residents, or classes of residents, are exempted from such service; but both statutes leave that subject to be disposed of by after legislation. Hence, every resident white man, within the specified ages, is liable to be called into the military service of the Confederate States, unless it can be shown that he comes within the provisions of the exemption statutes. We have shown above, that no person is naturally exempt from taking up arms in defense of his country; and it follows, that the *onus* is on him who claims exemption, to establish his right to it.

Imbecility, or disability, either mental or physical, is, *per se*, no legal exemption from military service in the army

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of the Confederate States. This results from the fact that exemption is a favor granted,—not a right conceded; and congress has no where said that mental or physical imbecility is a valid excuse for the non-performance of military service. In granting this boon, congress had power to prescribe terms and conditions on which it could be claimed; and it did so.

The language of the acts of congress, defining exemptions on account of bodily or mental incapacity, is as follows: "That all persons who shall be held to be unfit for military services, under rules to be prescribed by the secretary of war, shall be, and are hereby, exempted from military service in the armies of the Confederate States."—Act approved April 21, 1862, C. S. Stat. at Large, 1st session of 1st Congress, p. 51. The language of the act approved Oct. 11th, 1862, is as follows: "That all persons who shall be held unfit for military service in the field, by reason of bodily or mental incapacity or imbecility, under rules to be prescribed by the secretary of war, are hereby exempted from military service in the armies of the Confederate States."—Stat. at Large, 2nd session, p. 77.

I have thus quoted every word and syllable found in the acts of congress, which confer the right of exemption from military service, on account of mental or physical incapacity. It will be seen that neither mental nor bodily disease is, *per se*, a ground of exemption.

By act of congress, approved Oct. 11th, 1862, (Stat. at Large, 2d session, p. 75,) it is provided, "that there shall be established in each county, parish or district, and in any city in a county, parish or district, in the several States, a place of rendezvous for the persons in said county, district, parish or city, enrolled for military duty in the field, who shall be there examined by one or more surgeons, to be employed by the government, to be assigned to that duty by the president, on a day of which ten days notice shall be given by the surgeon, and from day to day next thereafter, until all who shall be in attendance for the purpose of examination shall have been examined; and the decision

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of said surgeons, under regulations to be established by the secretary of war, as to the physical and mental capacity of any such person for military duty in the field, shall be final." Section 2. "There shall be assigned to each congressional district in the several States, three surgeons, who shall constitute a board of examination in such districts, for the purpose specified in the foregoing section, any one or more of whom may act at any place of rendezvous in said district."

Provision had been made for the enrollment of conscripts, under other acts of congress.

Under the acts of congress from which I have given extracts above, the secretary of war has made and published the following rules:

"Questions of bodily and mental incapacity will be decided by surgeons employed for the purpose, by virtue of the act of congress approved on the 11th of October, 1862."

"Persons deemed incapable of bearing arms, shall be reported by the examining surgeon to the board of examination, who shall determine the questions of exemption, and grant certificates thereof. * * * So soon as the examining board shall be organized in any congressional district, and shall enter upon the discharge of their duties, no other mode of examination for persons in that district will be pursued; and the decision of the examining board will be deemed final."

"Applications for exemption must, in all cases, be made to the enrolling officer, from whose decision an appeal may be taken to the commandant of conscripts. The department will not consider the application, until it has been referred by the latter officer."

In the light of these statutes and these rules, I hold, that the petitions brought to view in the present cases show no ground which the judge of probate was authorized to inquire into or try. They do not aver that the petitioners had been "held unfit for military service in the field, by reason of bodily or mental incapacity or imbecility," under

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rules prescribed by the secretary of war. They set forth the grounds on which they severally claim the right to be enlarged; and when those grounds are examined, they are found wholly insufficient. They are as unimportant as the assertion of any other indifferent fact; such, for instance, as that the petitioner was a white man, was the head of a family, &c. A petition, claiming enlargement on a ground so utterly frivolous as those supposed, could scarcely command the serious consideration of any court.

I have shown above, that congress, in granting the privilege of exemption on the ground of mental or physical unsoundness, has reserved to the secretary of war, and to surgeons for whose appointment it makes provision, the right of passing upon the question of unsoundness. In other words, the statute exempts only such persons as are decided by the surgeon, or board of examination appointed by the president, to be incapable of bearing arms. This, I think, was very natural and necessary. It brings the adjudication of this very difficult problem within the control of experts, and saves the public service from delay and detriment, which, in some instances, might result from ignorance or favoritism. It avoids inequality, by providing a stationary and uniform board of examination, whose decisions, we must presume, would be much more likely to be right, than the opinions of any and every practicing physician who might be called to testify. Be this, however, as it may, the acts of congress give to the surgeon, and to the board of examination, the exclusive right to pass on the question of mental or bodily incapacity; and that takes from State courts all right to inquire into the question.—See *Federalist*, No. 82; 1 *Kent's Com.* 390, marg.; *Houston v. Moore*, 5 *Wheat.* 1; *Sturgis v. Crowninshield*, 4 *Wheat.* 193; *Prigg v. Commonwealth*, 16 *Pet.* 625; *Moore v. Houston*, 3 *S. & R.* 179; *Blanchard v. Russell*, 13 *Mass.* 16; *Livingston v. Van Ingen*, 9 *Johns.* 507; 2 *Story's Com.* § 1755-6, and note 2; *Martin v. Hunter*, 1 *Wheat.* 304; *Ex parte Gist*, 26 *Ala.* 156.

I take a further step. The acts of congress cited in

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this opinion, and the instructions framed under their authority, commit the determination of the various questions raised by the petitions for *habeas corpus*, to certain officers and agents of the Confederate government, and declare, in terms, that the decision thus pronounced shall be final. Under these circumstances, the State legislatures have no authority to create a new forum, or clothe it with power to settle or retry the question of mental or physical capacity for military service.—See *Wayman v. Southard*, 10 Wheat. 1; *U. S. Bank v. Halstead*, *ib.* 51. It would be passing strange, if State courts, in the absence of legislation, could perform functions which the legislature can not confer upon them.

Whether Confederate courts have, or can exercise, any greater powers over the question under discussion, is a subject not before me, and I will not decide it.

It may be contended, however, that while the foregoing argument may prove that State courts have no authority to discharge persons from military service on account of physical disability, *not shown to exist in the manner pointed out by the acts of congress, and the rules issued by the secretary of war*; still, I have failed to establish the proposition, that State courts may not, in such case, issue the writ of *habeas corpus*, and inquire of the legality of the imprisonment.

To this I answer, first, that the petitioners for *habeas corpus*, by placing their claim to enlargement on a fact that is, in law, utterly indifferent and frivolous, fail to show on the face of their petitions that they are illegally restrained of their liberty. The petitions do not contain the averment, common in such cases, that the petitioners are *illegally* restrained of their liberty. The averment is, that they are, “prisoners restrained of their liberty;” and they then set forth the ground, to-wit, physical unsoundness, on account of which, they aver and say, they are “advised by counsel and believe their imprisonment to be illegal.” Hence, there is a want of jurisdiction, in this, that the petitioners show themselves rightfully restrained, yet ask

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the writ of *habeas corpus*, that the legality of that restraint may be inquired into.

But, secondly : Jurisdiction is *the right to hear and determine a cause*.—*United States v. Arredondo*, 6 Pet. 691, 709 ; *Sheldon v. Newton*, 3 Ohio State Rep. 490, 499. Jurisdiction, says Bouvier in his Law Dictionary, is “a power constitutionally conferred upon a judge or magistrate, to take cognizance of and decide causes according to law, and to carry his sentence into execution.” In the case of *Rhode Island v. Massachusetts*, (12 Pet. 657, 718,) Mr. Justice Baldwin said, “Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit ; to adjudicate or exercise any judicial power over them.” Now, it seems to me to be clear beyond all question, that the power, or rather the absence of power, in the probate judge, over the subject of complaint brought to view by the several petitions for *habeas corpus*, demonstrates an entire want of jurisdiction in that officer, under each and all the definitions above set forth. The *gravamen* of each petition is, that the petitioner is physically unable to perform military service. Jurisdiction is the right to inquire into the alleged fact of such physical disability. The probate judge has no authority to inquire into, or try that question ; therefore, the probate judge has no jurisdiction of the causes made by the several petitions.

If it be contended further, that the judge of probate had jurisdiction, because he had authority to decide, as a judge, that he would not and could not enter upon the trial of the question of physical disability ; the argument is just as strong, and no stronger than would be the assertion, that every court which dismisses or repudiates a cause for want of jurisdiction, thereby affirms its jurisdiction, and disproves the truth of its own solemn sentence. It is rarely the case that any court attains the conclusion it has not jurisdiction of a given subject, without construing some statute, or announcing some legal or constitutional principle, which deprives it of jurisdiction. In the great

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case of *Dred Scott v. Sandford*, (19 How. 393,) the supreme court of the United States decided, that neither itself nor the circuit court had jurisdiction of the case made by the plaintiff; still that court enunciated some of the most important principles ever decided on this continent, and was compelled to decide many of them, to reach the conclusion that it had not jurisdiction of the case.

For these reasons, I hold, that the judge of probate has no jurisdiction of the cases made by the several petitions.

In an opinion, recently delivered by the chief-justice of the supreme court of North Carolina, I find that he concurs in denying to the courts power to retry the question of mental or physical incapacity.

When, on a former day, I delivered an opinion in these cases, I limited the operation of my remarks to cases which are in principle like the present, because there had not then been a conference between all the members of the court; and, as I felt inclined to differ from the chief-justice, on some propositions contained in his opinion, I purposely withheld my views until a full consultation with our absent brother could be had. That consultation has now been had; and although I am aware that, in what I am about to say, I go beyond the wants of the present case, I feel it a duty we owe to the public, that I make known certain other conclusions at which we have arrived.

A majority of the court holds, that the State courts have jurisdiction of the writ of *habeas corpus*, in all cases which come within either of the following classes: *First*, where the petitioner claims that the conscript laws do not reach him, or authorize his enrollment as a conscript, because he is under or over age, not a white man, or not a resident of the Confederate States; *Second*, where the party claims that he stands absolutely and unconditionally exempt from military service, because he belongs to some sect or class which the act of congress declares operates an exemption; such, for example, as Friends who have complied with the law, and officers, judicial and executive, of the State and

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Confederate governments. Questions may arise under the regulations which permit the putting in of substitutes, over which I would not hesitate to exercise jurisdiction; but, for reasons satisfactory to myself, I prefer not to define, at present, the extent to which I would exercise such jurisdiction.

Wherever, as in the present case, the privilege of exemption is granted on conditions, the adjudication of which is expressly reserved to certain officers named or provided for; or, where the acts of congress declare that the exemption shall cease and determine on the happening of certain events, *to be judged of and determined by the secretary of war, or other designated officer*, I hold, that such condition is a legitimate limitation on the boon of exemption, which congress had the clear right to impose; and that State courts have no authority to supervise the action of such officers, thus provided for and exercised, or to retry any question thus exclusively conferred on an officer of the Confederate government. To entertain jurisdiction in such cases, would lead to the most embarrassing and disastrous collisions between the authorities of the two governments.

I am of that school who believe, that the Confederate government is one of limited and defined powers, and that great care should at all times be exercised, to prevent it from enlarging its powers by construction. Our compound system of government, perhaps, exposes the States to encroachments upon their reserved rights, more than any other form of constitutional government could do. This grows, in part, out of the fact, that, within the sphere of their operation, the constitution of the Confederate States, and the acts of congress passed pursuant thereto, are the supreme law of the land. The constitution, in addition to its enabling clauses, which confer powers on the government, contains several restraints upon State authority. Under these clauses, an appellate jurisdiction was built up in the supreme court of the United States, which, in my opinion, was, in some instances, carried to an extent of doubtful propriety. I will not discuss this question here,

further than to say, that I think many of the imputed errors which crept into the old system grew out of the mistaken theory of the oneness of our distinct governments, and the too great subordination of the State to the Federal government. One source of alleged encroachment of Federal upon State authority has been removed, by a wise amendment of the second section of the third article of the constitution ; and other amendments have also shorn our young government of much of the power which the old one wielded to our detriment. I hope that, when the Confederate judiciary shall be fully organized, the heresies which aided in overthrowing the old Union, will not be allowed to enter the sanctuaries of the new.

I do not mean, in what I have said, to question the distinguished ability which has, at all times, marked the long and brilliant history of the Federal supreme court. My precise meaning is, that, in my judgment, false views of the powers of the Federal government, and especially of the relations which the States sustain to that government, found utterance at an early day ; and that the court in later years, although it burst some of the fetters by which early precedent had sought to confine it, left many of those errors unreversed. Let us avail ourselves of the much good bequeathed to us by the many able minds which have adorned that bench at every period of its history ; but let us avoid the errors which time and experience have made manifest.

I have said that an early error crept into our system, as to the relation which the Federal and State governments sustain to each other. In my opinion, we should struggle, from the very threshold of our existence, to keep the powers and functions of the two governments as distinct as possible. The dividing line of jurisdiction, where no territorial boundary marks it, must, in the nature of things, be sometimes difficult of ascertainment. Still, the line exists, and, when discovered, must be respected. It is history, now made sadly impressive by the ocean of noble blood which it has caused to flow, that by transgressions of

this boundary line, sometimes by the Federal, and sometimes by State governments, our once prosperous and happy country is now the theatre of a war of almost unprecedented malignity and atrocity. That enlightened jurist and venerated patriot, Chief-Justice Taney, speaking for the court, felt and expressed the necessity of preventing encroachments by one jurisdiction upon the other; but his counsels came when fanaticism had well nigh matured its parricidal plot, the culmination of which is now converting portions of our rich domain into a desolation.—See *Ableman v. Booth*, 21 How. 506; *Dred Scott v. Sanford*, 19 ib. 393.

The jurisdictional area of each government should be kept distinct—restraining the Confederate government within the boundaries of its delegated authority, and not allowing the State governments to trespass on Confederate jurisdiction. The powers conferred on that government by the Confederate constitution, the laws enacted under its authority, and treaties made pursuant thereto, are the supreme law of the land. Let us respect and obey them as such. Let us not weaken or destroy our Confederate power, by embarrassing that government in the manly exercise of those functions with which the States themselves have clothed it. This will neither destroy nor impair the sovereignty of the several States. They are not despotisms. For certain general purposes, they have conferred on the Confederate government certain attributes of their sovereignty; but they retain the others. They have thus become constitutional, instead of absolute sovereignties.—This no more destroys State sovereignty, than does the surrender of certain attributes of natural liberty destroy civil liberty. In upholding and maintaining each government in the exercise of its constitutional authority, each will necessarily be kept within the appointed orbit of its powers. This, I humbly conceive, would effectually prevent all collision of jurisdictions. It need not, and would not, interdict the comities and kind offices which belong to good neighborhood. These should be cultivated and strengthened, as the life-blood of our confederate existence.

R. W. WALKER, J., not sitting.

EX PARTE STRINGER.

[APPLICATION FOR HABEAS CORPUS.]

1. *Conscientious scruples against bearing arms, as ground of exemption from military service.*—A person who “conscientiously scruples to bear arms,” may claim exemption from military duty, under the provisions of the State constitution, (art. iv, *militia*, § 2,) upon payment of an equivalent for personal service; yet he is not entitled, on that account, to exemption from military service in the armies of the Confederate States, unless he belongs to one of the religious denominations, specially exempted by the acts of congress.

APPLICATION by Levi M. Stringer, for the writ of *habeas corpus*, to obtain his discharge from the custody of Major W. T. Walthall, commandant of the camp of instruction near Talladega. The petitioner alleged, that he was held in custody at the said camp of instruction as a conscript; that he was a regular member of a “Christian church,” and had conscientious scruples against bearing arms; that he was therefore exempt from military service, under that provision of the State constitution which declares, that “any person who conscientiously scruples to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service,” and claimed the right to pay an equivalent for personal service, as therein provided; that he had applied to the Hon. JOHN T. HEFLIN, one of the circuit judges of the State, for the writ of *habeas corpus*, claiming his right of exemption from military service on the ground above stated; and that said judge, on the hearing of the writ, had refused to discharge him.

L. E. PARSONS, for the petitioner.

STONE, J.—The several acts of congress, known as the “conscript laws,” are constitutional.—See *Ex parte Hill*, in re *Willis et al.*, at the present term. Those acts authorize the enrollment and conscription of citizens

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within the conscript age; and this, without invocation of State authority. The power of the Confederate government to conscribe the citizen, is derived from the Confederate constitution, and is not at all dependent on the constitution of the State of Alabama. The petitioner does not show a case which entitles him to exemption from military service under the acts of congress. Conscientious scruples against bearing arms, unless the party entertaining them belong to one of the religious sects mentioned in the statute, presents to the courts of the country no legal ground for declaring the petitioner exempt from military duty.

As the opinion of the entire court is not yet announced, nor indeed formed, on the broad question of jurisdiction of State courts in cases like the present; and as we feel no hesitation in refusing the present application on the merits, we place our refusal on the ground stated above.

The prayer of the petitioner is denied.

R. W. WALKER, J., not sitting.

EX PARTE HILL, IN RE ARMISTEAD vs. CONFEDERATE STATES.

[APPLICATION FOR PROHIBITION TO PROBATE JUDGE.]

EX PARTE DUDLEY.

[APPLICATION FOR MANDAMUS IN MATTER OF HABEAS CORPUS.]

1. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer.*—On petition for *habeas corpus*, by a person who, being liable to military service under the act of congress approved April 16th, 1862, commonly called the "first conscript law," procured and placed in his stead a substitute, and was thereupon discharged; but, after the passage of the "second conscript law," ap-

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proved September 27th, 1862, was again arrested by the enrolling officer, on the ground that his discharge had become inoperative, because his substitute was personally liable to service under the latter law,—the State court or judge to whom the application for the writ is made, has jurisdiction to determine the question of fact, whether the petitioner placed in his stead a substitute, and was thereupon discharged; and also the question of law, whether such discharge exempted the petitioner from liability to service under the latter law, his substitute being within the conscript age as therein specified. (A. J. WALKER, C. J., *dissenting*.)

2. *Same*.—The commandant of conscripts, at one of the camps of instruction, having vacated, on the ground of fraud, a discharge procured by a person who, being liable to military service under the "conscript laws" of Congress, had furnished a substitute in his stead; and the decision of the commandant having been approved by the secretary of war,—a State court or judge has no jurisdiction, on *habeas corpus* or otherwise, to revise or control the action and decision of the commandant, at the instance of the person whose discharge is thus vacated, on the ground that *ex-parte* affidavits were received against him on the trial, or that he was not notified of the time and place of taking testimony, or that he was not allowed an opportunity to cross-examine witnesses. (R. W. WALKER, J., *dissenting*.)
3. *Liability of principal to military service under "second conscript law," having furnished substitute under first*.—The 9th section of the "first conscript law" of congress declaring, that persons not liable to military service "may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war;" and the general orders (No. 37) published by the secretary of war on the 19th May, 1862, providing, in reference to exemptions procured by furnishing substitutes, that "such exemption is valid only so long as the said substitute is legally exempt,"—a person who was liable to conscription under said law, and who, after the publication of said general orders, placed in his stead a substitute who was between the ages of thirty-five and forty years, and thereupon obtained his discharge, became again liable to conscription, on the passage of the "second conscript law," and the president's call for men between the ages of thirty-five and forty years; and the same principle applies to persons who furnished substitutes after the publication of the general order (No. 64) dated September 8, 1862, which declares, that "a substitute becoming liable to conscription renders his principal also liable." (*Per tot. cur.*)

THESE two cases, though decided together, were argued and submitted at different times. The first was an application by L. H. Hill, an officer of the provisional army of the Confederate States, and the enrolling officer of the district embracing the county of Montgomery, for a writ of prohibition to the probate judge of said county, enjoin-

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ing and restraining him from further proceedings in the matter of a petition for *habeas corpus*, sued out before him by W. B. Armistead, who sought thereby to procure his release from the custody of said enrolling officer, on the ground that he had obtained a discharge from military service by placing a substitute in his stead. This application was made on a regular motion day of the January term, 1863, and was submitted at the same time with the last preceding case; being argued at the bar by P. T. SAYRE, on behalf of the Confederate States, and by S. F. RICE and JNO. A. ELMORE, with whom was A. B. CLITHERALL, for the petitioner Armistead.

The other case was an application by Charles H. Dudley, for a *mandamus*, or other remedial writ, directed to the Hon. N. W. COCKE, the chancellor of the southern chancery division, by which the petitioner sought to obtain a full hearing on *habeas corpus* before said chancellor, and a discharge from custody as a conscript. All the material facts of the case are stated in the opinion of STONE, J.

STONE, J.—The precise line of division which separates State and Confederate judicial authority, is not always easy of expression, if indeed it be easy of ascertainment. Operating, (within the sphere of its appointed powers,) as each government confessedly does, upon the same territorial area, and upon the same persons, it requires, in some cases, the closest scrutiny to prevent encroachment by one power upon the other. If either government, in the performance of its functions, by mistake or otherwise, transgress the boundary line which separates them, and trespass on the domain of another, such conduct does not conclude the other government, nor estop it from asserting and enforcing its own rights. On the other hand, if either government, or its officers, act within the sphere of its powers, although such action may be erroneous and reversible, it is not, except in certain specified cases, within the power of the other government to control its action thus performed, nor to correct the errors that

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may be committed. The distinction is between a want of authority over the person or thing, and an erroneous exercise of authority possessed. If the subject-matter be within the legal cognizance of the officer acting, no matter how far that officer may err in adjudicating or applying the law to such subject-matter, the redress, if any, must, as a general rule, be sought in the courts of the government whose officer has committed the error. But, if the officer exercise authority over a subject or person not within his official cognizance, the judicial officers of the other government may give redress, if the subject-matter be within the general scope of their jurisdiction.

The distinction attempted to be drawn above may be illustrated by the two cases of *Slocum v. Mayberry*, (2 Wheat. 1,) and *McClung v. Silliman*, (6 Wheat. 599.) The case of *Slocum v. Mayberry* arose under the 11th section of the embargo law, approved April 25, 1808, (2 U. S. Stat. at Large, 501,) which authorized the collectors of the customs "to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon." Under this act, the collector of the port of Newport, Rhode Island, had a vessel, with its cargo, seized by Slocum, the surveyor of the port; and Mayberry, the owner of the cargo, brought his action of replevin for the same in the State court of Rhode Island. The question was, had the State court jurisdiction? The supreme court of the United States, Chief-Justice Marshall delivering the opinion, decided, that if the question had arisen on the seizure of the vessel, the State court would have had no jurisdiction; but, inasmuch as the collector had no power or authority to detain the cargo, the act of congress not making provision for its detention, the State court had jurisdiction of the case.

In the case of *McClung v. Silliman*, the attempt was made to control, by *mandamus* from a State court, the offi-

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cial conduct of a register of a land-office of the United States, in the matter of a pre-emption claim. The court ruled, that the State court had no authority to direct or govern the official conduct of the register of the United States land-office.

So, it has been ruled, that if a marshal of the United States levy on goods under process against A, and B claim the goods as his property, in a suit by B against the marshal, State courts have jurisdiction of the question, whether the property belongs to B or to A.—*Dunn v. Vail*, 7 Mar. La. 416; *Bruen v. Ogden*, 6 Hals. 370. See, also, *United States v. Peters*, 5 Cranch, 115, 135; *McKim v. Voorhies*, 7 Cranch, 279; *Diggs v. Wolcott*, 4 Cranch, 179; *Kitteridge v. Emerson*, 15 N. H. 227; *McNutt v. Bland*, 2 Howard, U. S. 9.

Chancellor Kent's statement of the principle under discussion is as follows: "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But, if there be no jurisdiction in the instance in which it is asserted—as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B—then the State courts have jurisdiction to protect the person and property so illegally invaded."

Springing out of the principles settled in the cases of *Slocum v. Mayberry*, and *McClung v. Silliman*, *supra*, I think the following propositions may be laid down:

First: Whenever an officer, under authority in the premises conferred by the government under which he is acting, is in the performance of official duties; and, in the performance of such duties, there is expressed, or necessarily implied, the right to decide upon qualifications, or to draw inferences from facts, then any error of conclusion, or of judgment, into which he may fall, is not subject to revision or correction by the officers of the other government, nor is the officer acting subject to the coercive con-

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trol thereof, unless the constitution or laws give to the officers of the latter government such control or power of revision.

Second: Whenever the question is—not whether the officer correctly decided or acted in a matter within the scope of his power and jurisdiction—but, the inquiry is, has he erroneously applied his authority or jurisdiction to a person or subject-matter not within its scope, then the courts of the other government, if the subject and person be of a class which comes within their jurisdiction, may inquire of and determine the question of such erroneous application of authority, unless the law, in its terms, inhibit such inquiry.

There is scarcely any human action that is so entirely independent of all others, that in its performance it does not presuppose the existence of some other fact, past or present. These do not necessarily inhere in the subject-matter in hand, but are the accidents of the particular case. All actions are shaped or moulded, more or less, by their accidents, and by the decision which the actor pronounces upon them. Slocum, in seizing the vessel and cargo, construed the act of congress for himself and attained the conclusion, that it was his duty to detain the cargo as well as the vessel. In this, he traveled beyond his authority. The act of congress clothed the collector with authority to decide, in the first instance, whether it was the intention to violate or evade any of the provisions of the acts laying an embargo; and if, in his opinion, such was the intention, he was authorized to detain the vessel. He had no authority to detain the cargo. The question of detaining the cargo did not inhere in, or pertain to, the other and main question, namely, was there an intention to violate or evade the law? He erred in deciding this question of law. So, in the case of the marshal who seized the goods of B under process against A. He went beyond his authority when he seized the goods of B, and by that act became a trespasser. True, in seizing the goods of A, he must necessarily determine for himself, in

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the first instance, what goods belonged to A; but the decision was rendered necessary only by the accident that the goods of A and B were in a state of confusion. This is no more than the case of C and D, co-terminous land-proprietors, between whom the boundary is open and unascertained; if C, whether by mistake or otherwise, go over the line upon the lands of D, and there cut timber, he is a trespasser, and it does not excuse him that, in endeavoring to find his own land, he must necessarily decide where the boundary is.

The case of *McClung v. Silliman*, *supra*, illustrates the other phase of this question. In that case, the effort was made, through the instrumentality of a State court, to compel the register of the land-office to receive proof of the legal acts, and to prepare and furnish the documents which should initiate the applicant's claim to a pre-emption interest in a tract of land. The register refused the application. It will be observed, that the register was an officer of the United States, and was specially charged with the hearing of such applications, and with receiving and acting on the evidences on which such claims were based; and that all this was done under laws and rules enacted and established by the government of the United States. These several acts were part and parcel of the functions with which the land-officer was expressly clothed, and pertained naturally and universally to the service in which he was engaged. They were not the accidents of the case, but were important functions committed to him, which were called into exercise in every application for pre-emption made in his district. The supreme court of the United States denied the jurisdiction of the State court to control the action of the register by *mandamus*, saying: "The question in this case is as to the power of the State courts over the officers of the general government, employed in disposing of that land, under the laws passed for that purpose. And here it is obvious, that he is to be regarded, either as an officer of that government, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him."

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The precise facts of Mr. Armistead's case, as made by the petition for *habeas corpus*, are as follows: In August, 1862, the petitioner, being liable to conscription, procured and placed in the service of the Confederate States a substitute who was over thirty-five years of age; said substitute was accepted by the proper military authorities, and was mustered into the service, and thereupon the said Armistead received his discharge. The enrolling officer, contending that the probate judge has no jurisdiction of the questions presented by Mr. Armistead's petition, makes application to us for the writ of prohibition to that officer.

The questions which arise on the face of the petition for *habeas corpus*, are: First, was a substitute for Mr. Armistead accepted by the proper government officer, and did he (Mr. Armistead) receive his discharge? Second, is the legal effect of that discharge such as to exempt Mr. Armistead from conscription under the "act to amend an act entitled 'an act to provide for the public defense,' approved April 11, 1862," commonly called the "second conscript act?"—C. S. Statutes at Large, 2d session of 1st Congress, p. 61.

No question is made in this case on the fairness of the transaction by which Mr. Armistead obtained and put in his substitute; and nothing need be said in this case on that head.

We hold, that the probate judge had jurisdiction of each of the questions above stated. The first is a question of fact, which does not involve any revision or possible reversal of any decision pronounced by the Confederate officer or officers, charged with the duty of receiving substitutes. It does not involve the inquiry, did the officer act rightly in granting the discharge? The only question is, did he act? If the petition for *habeas corpus* truly state the facts, the petitioner had received his discharge from military service; and the question of fact was, discharge *vel non*. The act of congress approved April 16, 1862, (§9,) provides, "that persons not liable for duty, may be received as substitutes for those who are, under such regu-

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lations as may be prescribed by the secretary of war"—Pamphlet Acts 1st session of 1st Congress, p. 31. General orders Nos. 29 and 30, of 1862, of dates 26th and 28th April, provide, that on the receipt and mustering in of such substitute, the principal furnishing the substitute shall receive his discharge.

The second question was one of law ; namely, does the discharge thus obtained, and not vacated for fraud, operate an exemption from military service under the second conscript law ? The decision of this question by the probate judge does not involve a revision of any executory action of the Confederate officer. If it be a revision of anything, it is simply of the decision of the Confederate officer, pronounced on the legal effect of certain acts, previously performed ; nothing more nor less than determining whether the officer rightly decided the legal question as to the effect of the substitution and discharge—the accident of Mr. Armistead's case. If both of these questions be decided in favor of Mr. Armistead, he stands absolutely and unconditionally exempt from liability to conscription, under the law, as it then stood. If either of them be decided against him, he was not illegally restrained of his liberty. The decision of neither of the questions could have the effect of reversing or annulling any action of the Confederate officer, the performance of which was specially or exclusively confided to him. The writ of prohibition must be refused.—*Ex parte Hill*, at the last term.

Judge R. W. WALKER agrees with me in the foregoing conclusions, as to the jurisdiction of the probate judge in the case of Armistead, for reasons stated by himself. Chief-justice A. J. WALKER dissents, for reasons stated by himself.

The bill of exceptions in the case of Charles H. Dudley omits many dates, and, in other respects, leaves us in doubt as to the true state of facts on which the chancellor pronounced his decision. The present application seeks to reverse and control the action of the chancellor; and, under

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a well-known rule, it is our duty to draw every fair inference favorable to his correct ruling. If there be error, the party excepting must affirmatively show its existence. Shep. Dig. 572, §§ 145, 146; *Doe v. Godwin*, 30 Ala, 242; *Guilford v. Hicks*, 36 Ala. 95.

The record informs us, that Mr. Dudley attempted to show, on the trial of the *habeas corpus*, the following state of facts; That in August, 1862, he reported himself at camp Watts, with one Peters, who was examined, accepted, and mustered into service as Dudley's substitute, and he (Dudley) thereupon received his discharge; that some time afterwards, (date not given,) Major Swanson, commandant of conscripts at that camp, had him (Dudley) ordered back to camp, and detained him there; that the pretense on which he was ordered back, was some alleged fraud or duress practiced in procuring and putting in his substitute, Peters; that he applied to the secretary of war for leave to examine witnesses, and to cross-examine those against him; that this application was received by the secretary of war in December, 1862; that thereupon the sentence was suspended, and time allowed to rebut the evidence against him; that petitioner sought to have an order made, requiring mutual notices of the time and place of taking testimony, but failed to obtain such order; that on the last day allowed to petitioner to produce proofs, &c., *ex-parte* affidavits were again produced against him, heard as evidence, and the former decision sustained; that he again applied to the secretary of war to open and extend the time for the examination of witnesses, but his application was refused,—the secretary of war ruling that the substitution was set aside for fraud.

No dates are specified when any of these transactions took place, except three: first, the order of the secretary of war, made December 1, 1862, instructing the commandant to discharge Peters and detain Dudley; second, the time alleged, December, 1862, when the secretary of war received Dudley's first application to extend the time for testimony; and, third, that the extended time expired

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February 20th, 1863, for taking testimony in the cause. The application for *habeas corpus* was sworn to April 6th, 1863.

When the trial had so far progressed, as to bring to the notice of the chancellor the fact that the substitution had been set aside for fraud, and the order of the secretary of war had been issued thereon, refusing further extension of time, and approving the detention of Mr. Dudley as a conscript, the chancellor refused to proceed with the examination, declining to re-try the question of fraud in the matter of putting in Peters as a substitute for Dudley. We are asked to control the action of the chancellor by *mandamus*, or such other writ as may be necessary for the purpose.

We are not able to affirm positively whether or not the first order, vacating the substitution for fraud, was made before or after November 3d, 1862; but we must presume it was made after that time, as that presumption is most favorable to the correct ruling of the chancellor. The dates given incline us to believe such was the fact.

In general order No. 82, for the year 1862, under date of November 3d, are found orders relating to substitution, from which I make the following extract: "When a person claims exemption, on the ground that he has put a substitute in service, he must exhibit to the enrolling officer a discharge from some company, signed by the commanding officer of the regiment or command to which the said company belongs, or then belonged, (see general order No 26,) or an exemption signed by the commandant of conscripts. And if the said discharge or exemption do not show that it was granted in consideration of a substitute having been furnished, such fact must be certified in writing by the commanding officer of the regiment or command to which the company belongs, or by the commandant of conscripts, as the case may be. But, in all cases arising within thirty days from the date of this order, the enrolling officer may grant the exemption, upon satisfactory proof that the party furnished a substitute, who was actually received into the service of the Confederate States for three years or the

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war, and the substitute is not liable to military service. Such exemption may at any time be cancelled, if fraud or mistake be discovered."

I have given this lengthy extract, not because each clause, *per se*, bears on the question before us, but to show by the context what are the meaning and purpose of the last clause quoted. What, then, is the meaning of the language, "such exemption may at any time be cancelled, if fraud or mistake be discovered?" Obviously, not that the agreement between the principal and the substitute should, as a binding obligation between themselves, be liable to be cancelled for fraud, under proceedings had in the courts of the country. That right, so far as they were individually concerned, existed independently of the order. Nor, indeed, had the secretary of war the power of conferring such right upon mere private parties, nor of clothing State courts with such authority.—2 Story on Cons. §§ 1755-6, and note 2. Such an order, having that object, could not be regarded as a regulation of the privilege of putting substitutes in the army. Moreover, it can not be supposed that the Confederate government, even if it had the power, would deem it necessary to furnish the parties with a safeguard against imposition among themselves, cumulative and special, beyond that which all citizens enjoy under the general law. Fraud upon the public service was evidently had in contemplation. This is shown by the language of the order, and by the context, and is fully confirmed, if confirmation be necessary, by the great notoriety which the numerous frauds of that kind had acquired in the country.

This being the case, it is manifest that the inquiry of fraud *vel von*, for which the order makes provision, was not intended to take place in the ordinary course of proceedings in the courts of the country. The intention was, that the commanding officer, or commandant of conscripts, should inquire of and determine the question of fraud in the matter of the substitution. The purpose of the order was, to protect the public service against frauds on the privilege

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of putting in substitutes. The officers above named were, by irresistible implication, charged with the duty of trying the question of fraud; and, if it were found to exist, of cancelling the exemption. There is, doubtless, a final appeal to the secretary of war in such cases; but, when the decision is finally pronounced, the result is, if there has been fraud, to turn the substitute out of the service, and to place the principal in. In passing upon the question of fraud *vel non*, the commanding officer, commandant of conscripts, or secretary of war, as the case may be, must necessarily and uniformly hear and decide upon evidence, and draw inferences from facts. These things inhere in the very nature of the inquiry to be made. They always come up, and, hence, are not the accidents of the particular case. They are like the preliminary proofs, and documentary exemplifications, which pertain to the functions of a land-office register, in the matter of pre-emption claims. To allow the State courts to re-try or re-examine the facts on which such decision is pronounced, is to give to the courts of the State government appellate jurisdiction over the commanding officers, commandant of conscripts, or the secretary of war; officers who receive their appointments from the Confederate government, and who are specially charged, by that government, with the performance of these functions. The issue is not solely, nor even mainly, between the principal and the substitute. The Confederate government is directly concerned in the result; and, in its military service, will be the chief sufferer from a reversal of the decision pronounced by the commanding officer, or other officer acting in the premises. State courts have no authority to re-try the question of fraud *vel non*, in the matter of putting a substitute into the army, under the rules above copied.

If the commandant of conscripts, or the secretary of war, in violation of the plain rules of law, cancelled the substitution in this case, on evidence furnished by *ex-parte* affidavits, or refused to require notice of the time and place of taking the testimony, or did not afford to Mr. Dudley an

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opportunity to cross-examine the witnesses against him, each and all of these are but an erroneous exercise of rightful authority—not usurpation. The redress, if there be any, must be invoked from the authorities of that government which created the officer, and clothed him with his functions.—*McClung v. Silliman*, 6 Wheat. 598; *Ableman v. Booth*, 21 How. 506.

The chancellor did not err in refusing to re-try the question of fraud; and the motion of petitioner must be denied.

The chief-justice concurs in this conclusion. His own opinion contains his reasons. The opinion of Judge R. W. WALKER shows how he stands.

Mr. Armistead's application for enlargement rests, as his petition informs us, on the fact that, in August, 1862, he put in a substitute, who was over thirty-five years of age, and who was accepted, and he (Armistead) discharged. The petition does not aver, that the substitute was over forty years old when the writ of *habeas corpus* was applied for. The application was made January 27, 1863,—after the passage of the amendment to the conscript law of September 27, 1862, and after the call of the president for all up to the age of forty who were not legally exempt. We suppose, from the silence of the petition, that the substitute was in fact under forty years of age; and that the real controversy between Mr. Armistead and the enrolling officer, grows out of a difference of opinion between them, as to the effect of the president's call for conscripts up to the age of forty, on those persons who had previously obtained their discharge by putting in substitutes who were, at the time of the second call, liable to do military service on their own account, being within the then conscript age. Supposing this to be the main question in the cause, and entertaining, as we do, a deliberately formed opinion upon it, with which we are satisfied, we will proceed to announce it for the guidance of the present trial, and for others similarly circumstanced.

What, then, is the effect upon the principal of the en-

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largement of the conscript age, so as to embrace within its scope the substitute on whose account the principal had obtained his discharge? The conscript law (section 9) declares, "that persons not liable for duty, may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war." Stat. at Large, 1st session of 1st Congress, p. 31. This clause of the statute applies equally to conscripts called for under the second conscript law, which is but an amendment to the first.—Stat. at Large, 2d sess. 1st Congress, 61. The regulations prescribed by the war department for carrying into effect the conscript laws, so far as they affect the question in hand, are found in general orders of the year 1862, Nos. 29, 30, 37, and 64. General order No. 29, of date April 26, 1862, and general order No. 30, of date April 28, provide the rules for reporting, examining, receiving, and mustering in the substitute, and for discharging the principal. General order No. 37, of May 19, 1862, after copying the first exemption statute, and specifying certain exempts from military service, contains this clause: "IV. No persons, other than those expressly named, or properly implied in the above act, can be exempted, except by furnishing a substitute exempt from military service, in conformity with regulations already published, (general orders No. 29;) and such exemption is valid only so long as the said substitute is legally exempt." General order No. 64, September 8, 1862, contains this clause: "A substitute becoming liable to conscription, renders his principal also liable, unless exempt on other grounds."

Three decisions have been brought to our notice, pronounced on applications similar to that of Mr. Armistead: One in the matter of *Cohn*, made by Judge McGRATH, of the district court of South Carolina; a second, in the matter of *Underwood and Allen*, made by Judge JONES, of the district court of Alabama; the third, in the matter of *Irvin*, made by C. J. PEARSON, of the North Carolina supreme court. Each of the opinions delivered in these causes ignores general order No. 37, of May 19; and

neither Judge JONES nor Chief-Justice PEARSON makes any allusion to general order No. 64, of September 8. We must suppose their attention was not directed to these orders. Judge McGRATH makes some allusion to general order No. 64; but he treats it, not in its legislative, or prospective feature, but in its judicial, or retrospective bearings. He announced the opinion, that it was within the power of congress, or the president, to call into the military service those who had been discharged on putting in substitutes; but that the secretary of war could not do so. These three decisions are rested, mainly, on the constructions which the learned judges delivering them place on the two conscript laws of April 16, and September 27, 1862.

The line of argument employed in these several opinions is not precisely the same; but in the points actually decided, there is a substantial conformity. The following propositions, it is believed, express the principles on which each of them rests, with sufficient accuracy to do the authors of them no great injustice: *First*, That the petitioners, by putting in substitutes, had obtained discharges under the act of April; *Second*, That the act of September placed in the army only those persons who are between the ages of thirty-five and forty-five, and, consequently, did not put into the army the petitioners, who were under thirty-five: *Third*, That the act of September was passed to call into service persons within the specified age, who were *out* of the service—not those who were *in*, as the substitutes were; and that congress cannot be supposed to have intended that the substitutes should be mustered out of the service, that they might be again mustered in as conscripts, in order thereby to reach the principals who put in those substitutes.

To each and all of these propositions, as expressed, we unhesitatingly assent. The conclusion drawn from them is not so clear. But, what is meant by the idea expressed in these opinions, that the substitute is not to be mustered out of the service, that he may be again mustered in as a con-

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script? Is it intended thereby to combat an argument, leading to revivor of the principal's liability to military service under general order No. 64, provided the substitute is under forty? If such be the argument, we think it entirely misconstrues the language of general order No. 64; viz., "A substitute becoming liable to conscription, renders his principal also liable, unless exempt on other grounds." It does not mean that the substitute shall be in fact conscribed. The language will not admit of such construction, without great violence to its terms. The object of the regulation was not to place the substitute in the army; he was already in. The purpose was to declare the effect and scope of the exemption which the principal should enjoy, as the result of putting in a substitute. Its operation was upon the principal; but the event or contingency, on which its operation depended, pertained to the substitute. "Becoming liable to conscription," must mean that, in consequence of a change of the law, or of the *status* of the substitute, he comes within the age or description of persons liable to do military service on their own account. He cannot perform double service; and being liable to serve on his own account, he ceases to be a valid substitute for another. He has then become *liable to conscription*.

The true construction of the statute and general order is, that persons under thirty-five years of age, who put in substitutes between the ages of thirty-five and forty, are, in consequence thereof, exempt from military service, only until the substitute, by a change of the conscript age, or other circumstance, is embraced within the terms of the call. The principal then becomes again liable to serve in his own place; not under the act of September, but under the act of April, from which service he had enjoyed a temporary and defeasible exemption.

What we have said above is in reply to a supposed argument, based on general order No. 64. That order was issued on the 8th September, a month or more after Mr. Armistead claims to have put in his substitute. We need

not, and do not, decide whether that order was intended to operate retrospectively, or only upon substitutions perfected after that time. Mr. Armistead's case is clearly covered by general order No. 37, of May 19, copied above; for his substitute was put in in August, more than two months after that order was issued. The statute, in conferring the privilege of putting in substitutes, provided that it should be "under such regulations as may be prescribed by the secretary of war." Substitution is not, *per se*, a right: it is a boon—a privilege conferred. Congress, in granting it, was authorized to clog it with conditions; and it did so. It cannot be claimed, without a compliance with the regulations issued from the war department; and these regulations may be changed from time to time. The orders of 26th and 28th April—Nos. 29 and 30—contain no such clause as that found in the order of 19th May. Perhaps that subject was not thought of when the orders of April were issued. The order of May is too clear to admit of a cavil or doubt. It provides, that the exemption obtained on putting in a substitute, "is valid only so long as the substitute is exempt." This regulation, being made pursuant to authority conferred by congress, has the binding efficacy of law. It was part of the public law when Mr. Armistead put in his substitute, and therefore became part and parcel of the act done. He cannot complain of a breach of governmental faith, for he is charged with a knowledge of the terms on which his substitute was received. Neither can it, with any plausibility, be contended, that the order of 19th of May, declaring when the exemption shall expire, must be restricted in its operation to a certain limited number of contingencies; on the happening of some one of which the exemption of the principal shall cease. The language is as broad as it can be expressed—"only so long as the said substitute is legally exempt." If under forty, he ceased to be legally exempt when the call was made for conscripts up to that age; and Mr. Armistead's exemption, by reason thereof, then ceased to be valid.

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We might add to this argument, but do not perceive how we could make it clearer. It is one of those plain propositions which, in our conception, scarcely leaves any field for argument. Its strength lies in the statement of it.

The supreme court of the State of Georgia, on the application of *Farrell and Williams*, has recently had this subject under discussion, and has placed the same construction which we do on the order of May 19, 1862.

We need not, and do not, decide whether general order No. 37 retroacts on cases of substitution which were consummated before it was issued. No case of that kind has come before us, and we reserve our opinion until the question is properly presented.

It may not be improper to add, that this part of the opinion is concurred in by the entire court.

A. J. WALKER, C. J.—In *Ex parte Hill*, at the last term, I delivered an opinion, denying the jurisdiction of a State judge to discharge, on *habeas corpus*, one who had been enrolled as a conscript, upon the ground of his exemption from conscription. Neither subsequent reading and reflection, nor the opposing arguments of other judges, have changed my convictions. The question again arises in these cases; and I embrace the opportunity which is thus afforded, to fortify and extend my former argument. In doing so, I shall avoid, as far as possible, a repetition of what I have heretofore said. I therefore refer to my opinion in *Ex parte Hill*, in re *Willis et al.*, which must be read in connection with this, in order that the entire argument may be understood.

While the State courts have a concurrence of jurisdiction with the courts of the general government, where there is no legislative exclusion, over most subjects cognizable in the latter tribunals, this concurrence is not universal. The line of division between the concurrent and exclusive jurisdiction of the courts of the general government is not distinctly and clearly defined. I refer to discussions upon that subject, without comment, as my argument does not

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require that I should attempt to deduce from the authorities any general rule, which will govern in all cases the question of concurrence or exclusiveness of jurisdiction.— 1 Kent's Com. (m. pp.) 395 to 401; *Martin v. Hunter*, 1 Wheat. 304; *Houston v. Moore*, 5 Wheat. 1; *Teal v. Felton*, 12 How. 284. I adopt, with a modification as to the name of the government, the following language of Judge Story: "It would be difficult, and perhaps not desirable, to lay down any general rules in relation to the cases in which the judicial power of the courts of the United States is exclusive of the State courts, or in which it may be made so by congress, until they shall be settled by some positive adjudication of the supreme court. That there are some cases, in which that power is exclusive, can not well be doubted; that there are other cases, in which it may be made so by congress, admits of as little doubt; and that in other cases, it is concurrent in the State courts, at least until congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied."— 2 Story's Com. on the Constitution, § 1754.

The concurrence of jurisdiction in the State courts, over subjects falling within the judicial power of the Confederate States, is subject to exception. The judicial power of our general government extends to all cases arising under its constitution and laws. I maintain, that so much of that jurisdiction as is exercised in the application of judicial correctives to the irregularities and errors of the executive officers of that government, charged with the enforcement of the conscript law, is necessarily exclusive; and that such officers, when acting within the limits of their authority, can not be interfered with by a State court, although they may commit errors. As the government, in the execution of the conscript law, reaches and affects the persons of its citizens; and as any irregularity or error of the officers must wrongfully infringe the liberty of the citizen, the corrective must be obtained through a writ of *habeas corpus*, operating upon the erring officer. The proposition which I maintain, leads, therefore, directly to

the assertion, that the erroneous action of such officer, within the limits of his authority, or the incorrectness with which he discharges his duty, although injuriously affecting the liberty of the citizen, may be corrected by a Confederate, but not by a State court; through the instrumentality of the writ of *habeas corpus*.

The constitution bestows upon the government, not only the power of making laws, but the power of executing them. It prescribes that the president "shall take care that the laws be faithfully executed." Under the old articles of confederation, which preceded the constitution of the United States, the important powers of the government were executed through the agency of the States. The clause of the constitution above stated remedies that defect in the old system, and gives to the government authority to act directly upon individuals in the execution of its powers.—Federalist, XV. pp. 65 to 71; Calhoun on the Government and Constitution of the United States, 168. The constitutional authority to execute the law, is as ample and complete as the authority to pass it. The execution of the law must be accomplished, generally, through subordinate officers. Congress may prescribe the duties of such subordinate officers, but the constitution bestows authority to perform those duties. The constitution imposes no qualification or restriction upon this authority to execute the law. The political doctrines of secession and nullification suggest remedies for the usurpation of power, by the action of bodies representing the sovereignty of the States. The line of my argument does not touch either of those doctrines. When the government, in the exercise of its constitutional power to execute the law, through its officer, errs in the performance of its duty, and wrongfully touches the liberty or property of the citizen, the remedy by which the error may be corrected and the wrong prevented is judicial. To concede the power of a State court to apply that remedy, and thus to interfere with, and control and govern as to the manner of executing the law, is to confess that the power of execution is qualified and restricted

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to such mode and to such line of conduct as a State judge may approve. This power of executing the law is delegated by all the States, for their common good; and it would be a usurpation for the judge of one State to assume to control the government in the exercise of that power. If such control can be exerted by the judge in one State, it might result, that a power conferred for the good of all, when performed in a manner approved by the judges of all the States except one, would be thwarted by the interference of the judge in the single State who differed in opinion from the judges in the other States. The States gave the power, without qualification. This gift is the surrender of all right to control the government in the exercise of it.

I do not say that congress can abridge or qualify the jurisdiction of the State courts. The want of authority in the State tribunals, to supervise and control the executive officers of the Confederate States, in the exercise of their appointed functions, by the writs of injunction, replevin, *habeas corpus*, or other process, results from the delegation in the constitution of an unqualified power to execute the laws which congress may enact, and not from any denial of such authority by act of congress. If a State court can not correct, under a writ of *habeas corpus*, the errors of the enrolling officers engaged in enforcing the law of conscription, it is because the constitution bestows the power to execute the law without any qualification that it shall be done in a manner consistent with the judgment of a State judge, and not because congress has suspended, or can suspend, the writ of *habeas corpus*.

The constitutional power of executing the laws of congress, whether they touch the person or the property of the citizen, can not be subordinated to the authority of a State tribunal, by its supervision and control of the conduct of the executive officers acting within the area of their jurisdiction. This is an inevitable deduction from the proposition, that the general government is, within the sphere of its delegated powers, co-ordinate with the

respective States, and their equal; and that, within the area of its appointed attributes, its authority is as paramount as that of the States within the boundary of the powers not delegated nor surrendered. No ingenuity can successfully controvert this proposition. It rests for its basis upon the unqualified character of the grants of authority by the constitution. It has the repeated sanction of Mr. Calhoun, who, for years, applied his logic and learning to the investigation of the relations of the States with the government of the United States; who stood, in life, the vigilant guardian of the rights of the States, and a foe to the encroachments of the Federal government; and who, dying, has left in his "Discourse on the Constitution and Government of the United States," his views as matured by experience and protracted application to the subject. From this posthumous work I make the following extract:

"The government of the States sustained to the former [the confederacy which preceded the constitution of the United States] the relation of superior to subordinate,—of the creator to the creature; while they now sustain to the latter [the government of the United States] the relation of equals, or co-ordinates. Both governments—that of the United States, and those of the separate States—derive their powers from the same source, and were ordained and established by the same authority; the only difference being, that in ordaining and establishing the one, the people of the several States acted with concert, or mutual understanding; while in ordaining and establishing the others, the people of each State acted separately, and without concert or mutual understanding, as has been fully explained. Deriving their respective powers from the same source, and being ordained and established by the same authority, *the two governments, State and Federal, must, of necessity, be equal in their respective spheres*; and both being ordained and established by the people of the States respectively, *each for itself*, and by its own separate authority, the constitution and government of the United States must, of necessity, be the constitution and government of each, as

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much so as its own separate and individual constitution and government; and therefore they must stand, *in each State, in the relation of co-ordinate constitutions and governments.*”—Pages 166–167.

“It is obvious from this sketch, brief as it is, taken in connection with what has been previously established, that the two governments, general and State, stand to each other, in the first place, in the relation of parts to the whole; not, indeed, in reference to their organization or functions, for in this respect they are perfect; but in reference to their powers. As they divide between them the delegated powers appertaining to the government, and *as of course each is divested of what the other possesses*, it naturally requires the two united to constitute one entire government. *That they are both paramount and supreme within the sphere of their respective powers, that they stand within those limits as equals*, and sustain the relation of co-ordinate governments, has been fully established. As co-ordinates, they sustain to each other the relation which subsists between the different departments of government—the executive, the legislative, and the judicial, and for the same reason. These are co-ordinates, because *each, in the sphere of its powers, is equal to, and independent of the others*, and because the three united make the government. The only difference is, that, in the illustration, each department by itself is not a government, since it takes the whole in connection to form one; while the government of the several States respectively, and that of the United States, although perfect governments in themselves, and in their respective spheres, require to be united, in order to constitute one entire government. They, in this respect, stand as principal and supplemental, while the departments of each stand in the relation of parts to the whole.”—Pages 197–198.

“That they are both governments, and as such possess all the powers appertaining to government, within the sphere of their respective powers—the one as fully as the other—can not be denied.”—Page 241. See, also, pages 225, 242, 243, 252, 253.

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The preamble to the constitution of the United States represents that instrument to be ordained and established by "the people of the United States." The preamble to the constitution of the Confederate States represents it to be ordained and established by "the people of the Confederate States, each acting in its sovereign and independent character." The latter is precisely what Mr. Calhoun construed the former to be.—Discourse on Con. and Gov. of U. S., p. 128. The pertinency of Mr. Calhoun's observations to the question in hand is, therefore, not affected by the difference in language just noticed.

Under our compound system of government, the general government and the States are the peers of each other; and the authority of each, within the scope of its powers, is paramount over the other. To each there is a like negation of right to control the other in the exercise of its authority. The State can no more control the general government in the exercise of its powers through its appointed agents, than can the general government control the States in the exercise of their respective powers. The courts of the general government are limited in their jurisdiction. Aside from this consideration, and as a mere question of governmental power, the State tribunals can no more release from the custody of the executive officers of the general government one taken as a soldier, because, in the judgment of such tribunal, such person was not within the operation of the act of congress, than could a tribunal of the general government take from the custody of a State officer one taken as a State soldier, because, in its judgment, such person was not within the operation of the act of the State legislature. This must be so; otherwise, the two governments are not co-ordinate or equal.

Chief-justice Taney, speaking the unanimous opinion of the judges of the supreme court of the United States, but carried the propositions of Mr. Calhoun to their obvious and necessary result, when, in the case of *Ableman v. Booth*, (21 How. 516,) he penned the following sentence: "The powers of the general government and of the States, al-

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though both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres ; and the sphere of action appropriated to the United States is as far beyond the judicial process issued by a State judge, as if the line of division was traced by landmarks and monuments visible to the eye." While this sentence has been criticised for even its guarded application of the term *sovereignty* to the government of the United States, it is, in its substance and its import, but the embodiment of a great principle, obviously deducible from the teachings of Mr. Calhoun.

The principle for which I contend, is not only sustained by reasoning drawn from the relation of the governments, State and Confederate, to each other, but is established by judicial precedents, which every lawyer is bound to respect, if not to obey. The embargo act of 1808 authorized collectors of customs to detain *vessels*, whenever in their opinion there was an intention to violate the provisions of the act ; but it was silent as to the cargo. A vessel and *its cargo* having been detained, Chief-justice Marshall held, that an action could be maintained in a State court for the recovery of the *cargo*, because the act of congress gave no right of seizure or detention as to it ; but that an action for a vessel tortiously seized could only be brought in the Federal courts ; and that the officer having a right to seize for a supposed forfeiture, the question, whether that forfeiture had been actually incurred, belonged exclusively to the Federal courts, and could not be drawn to another forum.—*Slocum v. Mayberry*, 2 Wheaton, 9. The opinion says : "Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of congress, and the jurisdiction of a State court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the State court."

If there were no law authorizing conscription, and yet a

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citizen had been conscribed into the army, a case would be presented analogous to that over which the jurisdiction of the State tribunal was maintained in *Slocum v. Mayberry*. The case actually presented is one where there is a law authorizing conscription, and it is alleged that the proper officer has erred in the execution of the law, and wrongfully taken a citizen. The case is strictly analogous to that of which, it is declared, the State court has no jurisdiction. It is analogous to the case which would have been presented, if a collector of customs, authorized to seize vessels characterized by an intent to violate the law, had erred, and seized one not so characterized. In reference to such a case, the opinion above referred to declares, that the question whether the forfeiture has actually been incurred, belongs exclusively to the Federal courts, and can not be drawn to another forum; and that it depends upon the final decree, whether the seizure shall be deemed rightful or tortious. So, in the case in hand, the act of congress empowers the officer to conscribe persons characterized by certain qualities of age and capacity; and the question, whether the persons conscribed possess those qualities, belongs, so far as the control of the officer is concerned, exclusively to the Confederate courts, and can not be drawn into another forum.

By the supreme court of the United States, it has been held, that a *mandamus*, to compel the register of a land-office to perform an official duty as to an entry of the public land, could not be issued by that court, because it could not exercise original jurisdiction over such a subject. It was held, also, that the writ for such purpose could not be issued by the circuit court of the United States, notwithstanding the judicial power of the United States under the constitution extended to such a case. This latter decision is put upon the reason that, congress had not, by the judiciary act, delegated the judicial power of the government to control the register of the land-office by *mandamus*. Although it thus resulted, that no judicial tribunal of the United States, under the existing legislation, could give to

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an injured party redress, by compelling an officer to permit an entry of land, it was decided, that a State court had no jurisdiction over the subject, and an attempt to exercise it was rebuked, as "an instance of the growing pretensions of some of the State courts over the exercise of the powers of the general government."—*McIntyre v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 2 Wheat. 369; *McClung v. Silliman*, 6 Wheaton, 598. See, also, *Marbury v. Madison*, 1 Cr. 137; *Lytle v. Arkansas*, 22 How. 193; *Barnard v. Ashley*, 18 How. 45. The question is the same, whether the injury results from an error of omission or commission; and the principle which governs in the former case, must apply in the latter. Other cases of like character are collated by Chancellor Kent in his Commentaries, as will be seen by reference to an extract from that work made in my former opinion.

The principle which I assert is most clearly sustained and forcibly illustrated by the cases growing out of the fugitive-slave law. The act of 1850 authorized the reclamation of fugitive slaves by the procurement of a warrant from a commissioner, or by seizing and taking the fugitive before a commissioner, whose duty it was to grant a certificate, authorizing his removal to the State from which he escaped.—Brightley's Digest, 296, § 8. The proceeding before the commissioner, under that law, was summary, and *ex-parte*, and might be based upon affidavit made in the State from which the fugitive escaped. The courts of the United States held, that a State court had no power to interfere with the owner or marshal engaged in executing that law; and the South applauded the decisions, as asserting the only principle by which an execution of the law could be had in a community made, by fanatical opposition to slavery, unmindful of constitutional duty. The principle asserted in those cases, arising from the fugitive-slave act, is identical with that which I am endeavoring to maintain. It is a well established doctrine, that where two courts have concurrent jurisdiction, the exercise of the jurisdiction by one of the courts ousts the authority of the

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other. It is admitted, therefore, that the denial to a State court of jurisdiction as to a particular subject, over which a Federal court has commenced to exercise its authority, affords no argument against the existence of a concurrence of jurisdiction. If, therefore, it were true that the commissioner, in issuing a warrant for the seizure of a fugitive slave, acted as a court, and exercised a part of the judicial power of the United States, the negation of all authority in the State courts to interfere with the execution of the process might be referred to the doctrine just stated. But the commissioner who issued a warrant for the seizure of a fugitive slave, did not act as a court, or exercise judicial authority. His authority was in its nature judicial, or *quasi-judicial*, as contradistinguished from judicial authority. It is precisely the character of authority which the enrolling officer exercises under the conscript law, when he determines the question of liability to conscription.

Chief-Justice PEARSON, of North Carolina, in the matter of *Bryan*, before the supreme court of that State, argued against the proposition, that the officer executing the conscript law exercised *quasi-judicial* power, upon the ground that the vesting of such authority in an officer would break down the distinction, which the constitution carefully draws, between the executive and judicial departments of the government. In this argument, it seems to me, the learned chief-justice overlooks the difference between judicial authority, and that which is *quasi-judicial*, or merely judicial in its nature. The bestowment of any part of the judicial authority of the United States, upon an officer appointed and qualified as were the commissioners who were empowered to issue warrants for the seizure of fugitive slaves, and to authorize their return to the States from which they escaped, would have infringed the provision of the constitution which prescribes the mode of appointing judicial officers, and their tenure; and the proceedings before such commissioners would probably have been violative of the constitutional provision on the subject of jury trials. The constitutionality of the fugitive-slave law can

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only be maintained upon the ground, that the commissioner is not a judicial officer, and does not exercise judicial power. Upon that ground, it has been maintained by the courts of the United States, and by some of the State courts.—*Prigg v. Commonwealth*, 16 Peters, 622 ; Opinion of Judge Cheves, of South Carolina, in *Rhodes' case*, 12 Niles' Register, 264 ; Charge of Judge Nelson to the grand jury for the southern district of New York, 1 Blatchford, 635, 643, 644 ; Ex parte *Robinson*, 6 McLean, 354, 359 ; *Sims' case*, 7 Cush. 302–303 ; Ex parte *Jenkins*, 2 Amer. Law Reg. 149 ; Ex parte *Gist*, 26 Ala. 156. See, also, *United States v. Ferriera*, 13 Howard, 40, 51 ; *Gaines v. Harvin*, 49 Ala. 498.

I make the following extract from the above mentioned charge of Judge Nelson : “ It has been made a question upon this act [the fugitive-slave law], whether or not it was competent for congress to confer the power upon the United States commissioners to carry it into execution. As the judicial power of the Union is, by the constitution, vested in the supreme court, and in such inferior courts as congress may from time to time establish, the judges of which shall hold their offices during good behaviour, it has been supposed that the power to execute the law must be conferred upon these courts, or upon judges possessing this tenure. It is a sufficient answer to this suggestion, that the same power was conferred upon the State magistrates by the act of 1793 ; and which, in *Prigg v. Commonwealth of Pennsylvania*, was held to be constitutional, by the only tribunal competent under the constitution to decide that question. * * * The judicial power mentioned in the constitution, and vested in the courts, means the power conferred upon courts ordained and established by and under the constitution, in the strict and appropriate sense of that term—courts that compose one of the three great departments of the government, prescribed by the fundamental law, the same as the other two, the legislative and the executive. But, besides this mass of judicial power belonging to the established courts of a government,

there is no inconsiderable portion of power in its nature judicial—*quasi-judicial*—invested, from time to time, by legislative authority, in individuals, separately or collectively, for a particular purpose and limited time. This distinction in respect of judicial power will be found running through the administration of all governments, and has been acted upon in this since its foundation. A familiar case occurs in the institution of commissions for settling land claims, and other claims against the government. * The same answer may be given, also, to the objection founded upon the seventh amendment of the constitution, which provides that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * * * The proceeding contemplated by the clause of the constitution in question, is not a suit at common law within the meaning of that amendment. It settles conclusively no right of the claimant to the service of the fugitive, except for the purpose of removal to the State from which he or she fled; no more than the proceeding in the case of a fugitive from justice, for the purpose of his removal, settles his guilt. The question of right to the service in the one case, and of guilt in the other, is open to a final hearing and trial in the States whence the fugitives escaped."

Language equally pointed and clear will be found by reference to the other authorities above referred to. Our own court, in *Gaines v. Harvin*, (*supra*,) used the following language: "We not understand by this provision in the constitution, that it was the intention of its framers to deny to the legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary properly so called, many duties involving inquiries in their nature judicial. The practice of this, as of all other governments having their executive, judicial, and legislative departments separate and distinct, very clearly shows that, in the administration of the laws, inquiries partaking of the nature of judicial investigations are confided to persons other than judges, whose acts have never been questioned

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on constitutional grounds. Auditors and commissioners appointed in certain cases, and for specific but temporary purposes ; commissioners of roads and revenue, or for the allotment of dower ; the sheriff, in executing writs of inquiry in certain cases ; so, also, the masters in chancery, the commissioner of patents of the United States, and commissioners under the late act of congress in regard to the extradition of fugitive slaves, all perform duties in their nature judicial ; but we have seen no case holding their acts to be unconstitutional."

If it were true, as argued by Chief-Justice PEARSON, that to confer on the secretary of war and his subordinates the power of determining who is liable to conscription, would be "totally at variance with every principle of our government," then the fugitive-slave law, in its bestowment of power upon the commissioners, violated the constitution ; and the law investing the registers of the land-offices, and every department of the government, with *quasi-judicial* power, is unconstitutional. The authorities which I have cited, as well as those from which I have made extracts, fully illustrate and sustain the distinction which I have drawn, and I need not further discuss the point. I think it can not be controverted, by any one who respects judicial precedents and fair argument, that the commissioner who issued a warrant for the arrest of a fugitive slave, was no judge, held no court, did not exercise judicial authority, issued no process returnable to a court, and really put forth no judicial process ; notwithstanding, in the careless use of language, his process may have been so characterized. The commissioner was as much a ministerial, or executive officer, as the officer charged with the execution of the conscript law ; and their powers are alike *quasi-judicial*, as distinguished from judicial, in their character. Upon what ground, then, can it be maintained, that the State courts can interfere with the execution of the conscript law, and yet were without power to interfere with the enforcement of the fugitive-slave act ?

I proceed to notice some of the decisions and rulings

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made in the non-slaveholding States by the judges who were endeavoring to maintain the supremacy of the constitution and laws of the United States, opposed and resisted with a boldness and ingenuity without a parallel in the history of the country. Judge Nelson, of the supreme court of the United States, in the charge to the grand jury already referred to, used the following language: "There have been different opinions entertained by the judges of the States, as to their power under this writ [the writ of *habeas corpus*] to decide upon the validity of a commitment or detainer by the authority of the United States. But those who have been inclined to entertain this jurisdiction admit that it can not be upheld, where it appears from the return that the proceedings belonged exclusively to the cognizance of the general government. This necessarily results from the vesting of the judicial power of the Union in the Federal courts and officers, and from the fourth article of the constitution, which declares that "the constitution, and laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." If the exclusive power to execute the law is in the Federal judiciary, and the act is to be regarded as the supreme law of the land, and to be obeyed as such, it is difficult to see by what right or authority its execution can be interfered with, through the agency of this writ, by State authorities. Any such interference would seem to be a direct infraction of the constitution. It is proper to say, in order to guard against misconstruction, that I do not claim that the mere fact of the commitment or detainer of a prisoner by an officer of the Federal government bars the issuing of the writ, or the exercise of power under it. Far from that. Those officers may be guilty of illegal restraints of the liberty of the citizen, the same as others. The right of the State authorities to inquire into such restraints is not doubted; and it is

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the duty of the officer to obey the authority by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the constitution, or a law of the United States, or a treaty, the power of the State authority is at an end, and any other proceeding under the writ is *coram non judice* and void. In such a case—that is, when the prisoner is in fact held under process issued from a Federal tribunal, under the constitution, or a law of the United States, or a treaty—it is the duty of the officer not to give him up or allow him to pass from his hands at any stage of the proceedings.”

Judge McLean, one of the judges of the supreme court of the United States, in reference to a case where a Kentuckian, the owner of slaves, seized then in Michigan without a warrant, held, that the owner having a warrant issued by a commissioner, or having seized his slaves in the absence of a warrant without a breach of the peace, upon the return of either of those facts, the authority of the State court under a writ of *habeas corpus* would cease, because it would then appear that the prisoner was held under the authority of the constitution and laws of the United States. *Norris v. Newton*, 5 McLean, 82.

A case is reported in 5th Am. Law Reg. 659, September, 1857, (Ex parte *Sifford Marshall, et al.*), which was decided in an able opinion by Judge Leavitt in the district court of Ohio. In that case, some persons had resisted the marshal in the arrest of a fugitive slave. Those persons were arrested under a warrant upon the charge of resisting the officer. An attempt was made to take the prisoners out of the custody of the marshal by virtue of a writ of *habeas corpus* issued by a State judge. For an assault and battery committed in resisting this attempt, the marshal and his posse were arrested under a warrant issued by a justice of the peace. A *habeas corpus* was obtained from the district judge; and he, in passing upon the power of a State court to interfere with the custody of prisoners held by the marshal under a warrant, used the following language: “The doctrine seems now to be settled, that a State judge has no jurisdic-

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tion to issue a writ of *habeas corpus* for a prisoner in the custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ. And it is well settled, that if, upon the return of the writ, it appears the prisoner is in custody under the authority of the United States, the jurisdiction of the State judge is at an end, and all further proceedings by him are void." The same judge, in an opinion of great ability in another case, in 1856, after examining the authorities, held as follows: "If judicial decisions are entitled to any consideration, it is clearly established that, though it may be competent for a State judge to issue the writ of *habeas corpus* in a case of imprisonment under the authority of the law of the United States, when the fact is made known to him his jurisdiction ceases, and all subsequent proceedings by him are void."—Ex parte *Robinson*, Am. Law Reg. for August, 1856, vol. 4, p. 617; Ex parte *Robinson*, 6 McLean, 35.

In the celebrated *Sims* case, (7 Cush. 285,) the supreme court of Massachusetts declined to issue a writ of *habeas corpus* for a fugitive slave, claimed in the petition to be free, who had been arrested under a warrant issued by a commissioner. The court, in an opinion delivered by Chief-Justice Shaw, while admitting the general proposition, that a State court "can not issue a writ of *habeas corpus* to bring in a party held under color of process from the courts of the United States, or whose services and the custody of whose person are claimed under authority derived from the laws of the United States," denies the universality of the proposition, and instances the cases of soldiers and sailors held by military and naval officers under enlistments complained of as illegal and void, as exceptions. The distinction intimated can only be maintained upon the supposition, that the principle involved would yield at the judicial will to suit the wants of the case.

Finally, the subject was presented to the supreme court of the United States, in the two cases of *Ableman v. Booth*, and *The United States v. Booth*, in which Chief-Justice Taney delivered the opinion of the court, which is reported

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in 21 Howard. In one of those cases, the Wisconsin court discharged Booth from imprisonment under a commitment by a commissioner for resisting the execution of the fugitive-slave law. In the other, the court of the same State discharged the same person from imprisonment under a judicial conviction for the same offense. The supreme court of the United States, as will be seen by reference to pp. 523-524, placed its decision upon the ground, that a State court can not interfere with the custody of one held under the authority of the United States. After conceding the right of a State court to ascertain by what authority a prisoner within the confines of its territorial jurisdiction is held, the court uses the following emphatic language: "But after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know *that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties.* He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him, and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known by a proper return the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court, upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the

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authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal, *or other authorized officer or agent* of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

It has been objected to the authority of this opinion, first, that the court and the great jurist who delivered it did not really mean what is said; and secondly, that it must at all events be treated as an *obiter dictum*—as the opinion of an able lawyer on a question not presented by the facts before the court. In reply to the former objection, I have only to say, that when the case of *Ableman v. Booth* was decided, the supreme court of the United States, with its nine judges, in the high qualities of lofty integrity and profound learning; had no superior, if it had an equal; and it is inconceivable that the language of so important an opinion should have obtained the unanimous sanction of such a tribunal, unless it afforded a true index to its opinions. The second objection is as groundless as the first. The decision of the case in which there had been a conviction and a sentence, might have been put upon the principle, that the judgments of judicial tribunals, within the area of their jurisdiction, are conclusive. In the other case, where there was simply an arrest and commitment by authority of a commissioner, that proposition would not have decided the case; for the authorities hereinbefore cited show, that it is now the established doctrine, however much it may have been controverted in the past, that the commitment of one to answer before a court for an offense does not involve the exercise of judicial power. Although an offender may have been committed by a commissioner, to answer a charge, the truth of

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the accusation may be investigated on *habeas corpus* issued by a judge of a Federal court, and also by a State judge, if he has a concurrence of jurisdiction.—See particularly the opinion of Judge Grier, in the case of *Jenkins and Crosson*, reported in the Amer. Law Reg. for January, 1854, p. 144. In order to cover both cases, it was, therefore, necessary for the supreme court of the United States to find some broader principle; and it seems to me that they have laid down the only principle which could have controverted the State jurisdiction in both cases.

But it may be said, that the court should have restricted its doctrine to the very facts of the case, and, instead of announcing the broad and comprehensive principle, that the jurisdiction of the general and State governments are as distinct as if separated by visible marks—that neither can cross the line which divides their jurisdictions, and that, therefore, a State tribunal can not interfere with the custody of one held under the authority of the United States—should have emasculated the principle, by adding the proviso, that its application should be confined to cases of imprisonment under the warrant of a commissioner, or under a conviction in a Federal court. It is not right to denounce the statement of a principle as an *obiter dictum*, because it is large enough to cover other cases than those decided. To do so, would banish from the bench the assertion of those comprehensive and leading doctrines which give stability and harmony to jurisprudence, and require the judicial mind always to present principle narrowed down by the facts of the particular case, and therefore unfitted to be a rule of conduct in the affairs of life. The great doctrine stated by the supreme court of the United States was applicable to the cases decided, and controlled their decision. It is, therefore, not an *obiter dictum*.

As the result of my long review of the decisions growing, directly and indirectly, out of the fugitive-slave law, I confidently assume, that the principle which I have asserted is fully supported by them, and that it has the sanction of the supreme court of the United States, which,

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under the old system of government, would have been a commanding authority. I admit, as I have heretofore done, that many State decisions—in New York, New Hampshire, Massachusetts, Pennsylvania, Maryland, and Virginia—maintained the power of State courts to interfere with the custody of persons held under the authority of the United States. Many of those cases are noticed in my former opinion, and they are collated by Hurd in his work on Habeas Corpus. All the State courts did not decide the same way. The question seems to have been decided both ways in Georgia. So, also, the decisions were contradictory in South Carolina.—*Rhodes' case*, 12 Niles' R. 264; *In the matter of Merritt*, 5 Amer. Law Journal, 497. In the former of those cases, Judge Cheves delivered an able opinion, controverting the State jurisdiction. In the latter, Judge Nott recognized the jurisdiction, without noticing the point. So, also, in North Carolina, the jurisdiction was exercised without any notice or discussion of the question.—Ex parte *Mason*, 1 Mur. 326. In New Jersey, Judge Southard, speaking for the court, avoids the question of jurisdiction; but for himself remarks, that it would require a "great struggle of feeling and judgment for him to ever arrive at the point where he would be prepared to deny the State jurisdiction."—*State v. Brearly*, 2 Southard, 555.

In the Federal courts, the jurisdiction of the State courts was never acknowledged. In *Veremaitr's case* it was expressly denied.—Hurd on Habeas Corpus, 197. In the case of *Keeler*, (Hempstead's R. 306.) it was doubted, if not denied. No American law-writer has conceded the jurisdiction, except Mr. Hurd, whose book was written in Ohio, in 1858, during the struggle of the State courts, in the non-slaveholding States, to defeat the enforcement of the fugitive-slave act; and who exhibits his own proclivities, by the expression of doubts as to the constitutionality of that act—pp. 648, 649. Chancellor Kent as a judge in New York denied the State jurisdiction, and afterwards in his commentary only yielded the point to a later decision

in that State so far as to say, "the question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States"; but there is no evidence that he ever abandoned the views expressed by him from the bench.—*Ferguson's case*, 9 Johns. R. 239; *In the matter of Stacy*, 10 *ib.* 328; 1 Kent's Com. 401. Sergeant, in his work on Constitutional Law, (p. 283,) treats the question as unsettled, and contents himself with giving the decisions on both sides of it. In Duer's Treatise on Constitutional Jurisprudence, (p. 180,) published in 1856, the subject is thus disposed of: "Under what circumstances, and how far, the judges of the State courts have power to issue a *habeas corpus* and decide on the validity of a commitment or detainer under the authority of the national government, are questions which have been variously determined in the States, and never definitely settled in the supreme court of the United States, where the ultimate right of determining them resides." In 1842, Conkling's Treatise on the Jurisdiction of the Federal Courts issued from the press. That work, in reference to this subject, employs the following language: "Whether, and if so under what circumstances, the judges of State courts can rightfully exercise this power, are questions which have been variously decided in the courts of the several States. It seems to have been agreed on all hands, however, that admitting the power to exist, it ought to be exercised with great caution and reserve; and among the advocates of the power it has generally been supposed, that it ought to be limited to the inquiry, whether the court or officer, in virtue of whose process or order the prisoner was confined, had jurisdiction of the case." In this unsettled condition the supreme court of the United States found the question in 1858, when it decided the case of *Ableman v. Booth*. That decision, on account of the high character for learning, integrity, and patriotism of the judges, the relation in which the court stood to other tribunals, and the sound reasoning which it developed, ought to have settled the

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question; and in all probability the point would never again have been agitated, if we had continued to occupy our former relation to the United States. *Tempora mutantur, nos et mutamur in illis.*

Ingenuity may suggest the reply to my argument, that the conscript law bestows no authority to enroll those who are exempt for any of the reasons specified in the law; and that, therefore, the officer who visits conscription on one not liable, does not act under the authority of the government of the Confederate States. To this reply I rejoin, that there is a necessarily implied authority in the officer to determine who are amenable to conscription; for how can he enroll those liable, and exempt those not liable, without determining who belong to the respective classes? The officer, in ascertaining who are within the age of conscription, as clearly exercises an authority bestowed by act of congress, as he does in enrolling a man of undisputed liability. A youth is presented to an enrolling officer; his age is doubtful; the law commands the officer to enroll him, if he is eighteen years of age; the officer does not know whether he is of that age; must he, because he is thus uninformed, discharge the young man? He must do so, unless he has authority under the law to investigate the question of age; for, as an officer, he can do nothing for which the law does not afford a warrant. The authority to determine the question of liability to conscription is necessarily involved in the power to conscribe; for there can be no conscription without the ascertainment of its proper subjects. An officer must have the power necessary to discharge his duty. Certainly the officer may err; so may all the officers of the general government—the collector of customs, the post-master-general, the commissioner who commits persons held to have violated the criminal law, and all others who exercise powers which concern the pecuniary interest, the property, or the liberty of the citizen; yet it will scarcely be contended, that it is the province of a State tribunal to visit a controlling authority over those officers, in order to coerce the correc-

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tion of their errors. One government cannot thus control the officers of a co-ordinate government. If it can, the two governments are not co-ordinate and equal within their proper spheres—the latter is subordinate and inferior to the former.

If the officer charged with the execution of the conscript law has no authority to decide the question of liability to conscription, it is competent for any State officer, authorized to issue a writ of *habeas corpus*, to treat every enrollment as a nullity, and to discharge every man enrolled, when in his judgment there was not a liability. The officer becomes liable to a conviction for false imprisonment, if a State court differs from him upon the question which he is bound to decide. He may have decided and acted precisely as he thought to be right, and as the judicial tribunals of the government, whose officer he was, would approve; and yet he may be punished as a criminal, because some judicial officer of another government entertained a different opinion. An army raised in a particular State, and deemed liable to conscription by the executive and judicial departments of the Confederate government, and of the State where it was raised, may, upon reaching some other part of the Confederacy, find some officer, clothed by the State law with power to issue the writ of *habeas corpus*, whose peculiar views will lead him to disband the army in a day. The tribunals of a single State, differing from those of the Confederate States and of every other State, may utterly subvert the application of the power to raise armies to that State. They may even invite the people from other States, by peculiar rulings, to fly to their jurisdiction as a shelter from the enforcement of the law. It is to be apprehended that our government will not be permitted to pass through its infancy, without experiencing some or all of the ruinous consequences which are (as I believe) probable results of the proposition, that State courts have the jurisdiction claimed for them.

Congress has power, granted by the constitution, to suspend the privilege of the writ of *habeas corpus*, when, in

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cases of rebellion or invasion, the public safety may require it.—Constitution of the United States, art. I, § 9, ¶ 2; Constitution of the Confederate States, art. I, § 9, ¶ 3. An unavoidable sequence of the proposition, that there is a concurrent jurisdiction in the State tribunals, in reference to the custody of persons held under the authority of the general government, is, that the suspension by congress applies to State courts and judges. Upon the hypothesis of the concurrent jurisdiction, the suspension would be utterly vain and nugatory, unless it affected State tribunals; for, if it were restricted to the tribunals of the general government, an applicant for relief under the writ would only find it necessary to address his prayer to a judicial officer of the State, instead of the Confederate States. I am not prepared to admit, that the framers of the constitution ever intended to subject the use of the great remedial writ of *habeas corpus* by the States, to the control of another government: *Habeas corpus* is the instrument by which the State tribunals redress wrongs, varied and extensive in their character, which cannot affect the general government, either in peace or in war, in times of domestic quietude or rebellion. I do not think that the convention which framed the constitution aimed to bestow any authority to interfere with the use of that writ by the State judges. The object of the States was to delegate only such powers as would enable the government “to do that which either could not be done at all, or as safely and well done by them as by a joint government of all.” In the clause in reference to *habeas corpus*, there is a great departure from that prime object, if it be understood to apply to the employment of that writ by the State tribunals.

As the writ of *habeas corpus* was never suspended by the government of the United States before the secession of the southern States, we can find in its annals no decision upon the exact question in hand. Nevertheless, I think Chief-Justice Marshall and Chancellor Kent have announced a principle irreconcilable with the supposition that congress can suspend the issue of the writ by State judges.

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The former of those two eminent jurists, in *Baron v. The Mayor &c. of Baltimore*, (7 Peters, 247,) used the following language : "The constitution was ordained and established by the people of the United States, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred upon the government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons, and for different purposes." In the same opinion, the principle is distinctly stated, that no limitation of the action of the government of the United States on the people would apply to the State governments, unless expressed in terms; and that in every inhibition in the 9th and 10th articles of the constitution, intended to act on State power, words are employed which directly express that intent. Chancellor Kent's views upon the same subject are thus expressed : "As the constitution of the United States was ordained and established by the people of the United States for their own government as a nation, and not for the government of the individual States, the powers conferred, and the limitations on power contained in that instrument, are applicable to the government of the United States, and the limitations do not apply to the State governments except in express terms. * * The people of the respective States are left to create such restrictions on the exercise of the power of their particular governments, as they may think proper, and restrictions by the constitution of the United States, on the exercise of power by the individual States, in cases not consistent with the objects and policy of the powers vested in the Union, are expressly enumerated."—See, also,

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In the matter of Smith, 10 Wend. 449 ; *Livingston v. Mayor of N. Y.*, 8 ib. 85-100 ; *Barker v. People*, 3 Cow. 636-700 ; *Murphy v. People*, 2 Cowen, 315-20 ; *Noles v. State*, 24 Ala. 672-690 ; *Boring v. Williams*, 17 Ala. 510-516.

While the provision of the constitution implies an authority to suspend the privilege of the writ of *habeas corpus*, it restricts that authority to occasions when, in cases of rebellion and invasion, the public safety may require it ; and it likewise restricts judicial authority by a prohibition to relieve under the writ, when there is a constitutional suspension. I cannot perceive how this limitation of judicial authority can, consistently with the principle stated by Chief-Justice Marshall and Chancellor Kent, be made to apply to the judicial department of the State government. A theory, which necessitates the imposition of such a restriction upon the authority and power of State judges, can not, it seems to me, be correct.

If it be understood that the State judges cannot discharge persons held under the authority of the Confederate States, perfect harmony in the operation of the two systems is preserved. Neither the States collide with the general government, when it, in the exercise of its powers, takes a person into custody ; nor the latter with the States when exercising their proper judicial functions. And the States will be left, as it was intended they should, in the undisturbed exercise of powers, extending "to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Federalist*, No. XLV, 216.

The privilege of interfering with the general government, in the execution of its laws, is no compensation to the impaired and wounded sovereignty of the States, for the concession to another power of the authority to suspend the right of their citizens to obtain the writ of *habeas corpus* from their judges.

This question, so far as I have discovered, was noticed in only one of the State conventions, which ratified the con-

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stitution of the United States. In the Massachusetts convention, Judge Sumner, discussing the clause as to the suspension of the writ of *habeas corpus*, said: "Congress have only power to suspend the privilege to persons committed by their authority. A person committed under authority of the States will still have a right to the writ." 2 Elliott's Debates, 109.

I concede, and never intended to be understood as controverting, the authority of the State courts to inquire into the cause of imprisonment of the citizens of the State. On the contrary, I hold, as do all the authorities, that a State judge ought to take jurisdiction, until he ascertains that the petitioner is held under the authority of the Confederate States; and that as soon as he is so informed, whether by the petition itself, or the subsequent proceedings, he ought to repudiate the cause.—*Ableman v. Booth*, *supra*; also, *Sims' case*, 7 Cush. 285; *Watkins' case*, 3 Peters, 204; Ex parte *Passmore Williamson*, Amer. Law Register for November and December, 1855, vol. 4, p. 31.

I fully concur with my brother STONE in the conclusion attained by him in the Dudley case. I concur with him, also, in his construction of the law and regulations on the subject of substitution. As far as the question of jurisdiction is concerned, I rest my conclusion upon my own argument, and do not assent to the reasoning which concedes jurisdiction to the State courts in some cases, and denies it in others.

This opinion has been swelled to a great length by the numerous and extended quotations made in it. My apology for this is, that I have felt solicitous to vindicate my position with the bar of the State; and I thought it would be better to make the literal extracts found in this opinion, because many belonging to the profession may not have the time or opportunity to examine the works from which the quotations are made. At the time when I wrote my first opinion, there had been only one or two adjudications upon the subject in the Confederate States. The question has been now, expressly and by implication, passed upon

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by several of the appellate State tribunals in our Confederacy; and in no case known to me has an appellate State court sustained the doctrine which I maintain. Both of my brother judges differ from me. There has not yet been established a supreme court of the Confederacy, which could serve as a common arbiter, to whose decision all would submit. Under the circumstances described, I must treat the question as settled for the present; and although not convinced of any error in my reasoning and conclusions, I shall, so long as those circumstances continue to exist, suffer the State jurisdiction to be exercised, to the extent agreed upon by this court, without further controversy.

R. W. WALKER, J.—This case presents the question of the power of the State courts to discharge, on *habeas corpus*, persons illegally held in custody by the enrolling officers of the Confederate States, under the asserted authority of the acts of congress popularly known as the “conscript laws.” I am strongly inclined to the opinion, that the jurisdiction of the State courts to issue the writ of *habeas corpus*, to bring in persons held as conscripts under the alleged authority of these laws, and to try the lawfulness of their detention, is concurrent and *co-extensive* with the jurisdiction of the Confederate courts in the premises. At all events, I am thoroughly satisfied, that whenever a person in the custody of an enrolling officer in this State shows that he belongs to any one of the classes of persons expressly “exempted” from military service by the laws of congress; or that, having furnished a substitute, he has obtained a discharge, which is still valid and operative; or that he is not of conscript age; or that, because of non-residence, color, or other legitimate reason, the law of conscription does not apply to him, it is not only the right, but the sacred duty of the judges of the State courts, to discharge him on *habeas corpus*.

The only question necessarily presented, and, as I understand it, the only question actually decided in *Ex parte*

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Hill, at the last term, (in which I did not sit,) was as to the jurisdiction of the State courts, on *habeas corpus*, to discharge on the ground of physical incapacity, persons in the custody of the enrolling officer, who fail to show that they have been “*held* unfit for military service, by reason of bodily incapacity, under rules prescribed by the secretary of war.” On that question I prefer to withhold an opinion for the present; contenting myself with saying, that if the State courts have no power to discharge in such a case, it must be because a person who has not been “*held* unfit for military service, by reason of bodily incapacity, under rules prescribed by the secretary of war,” is not legally exempt from conscription, although he may be *in fact* unfit for military service on account of such incapacity. If that be so, the enrollment and detention of such a person as a conscript are authorized by law; and, consequently, the judges of the Confederate courts would not, any more than those of the State courts, have power to discharge him on *habeas corpus*.

The application for the prohibition is placed upon the ground, that the probate judge, in issuing the writ of *habeas corpus*, and taking cognizance of the matters therein mentioned, has “acted without authority of law, and usurped jurisdiction of matters which are only cognizable before the judicial or military tribunals of the Confederate States.” I think it should be overruled, even if it should appear that the state of facts set forth in the petition for *habeas corpus* does not with complete certainty exclude the idea that the petitioner may be now liable to enrollment. The writ of prohibition ought not to be granted in such a case, unless it is plainly shown that the judge was proceeding to try a question, or exercise an authority, out of his jurisdiction.

As the subject is one of the gravest import, and as the state of my health disables me at present from stating at large the grounds of my opinion as to the existence and extent of the jurisdiction of the State courts, on *habeas corpus*, in cases arising under the conscription laws, I wish to

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reserve the privilege of preparing and filing hereafter another opinion in this case, in which I will express more fully my views on this interesting and important question.

NOTE BY THE REPORTER.—The foregoing opinion of R. W. WALKER, J., applies only to *Armistead's case*, and seems to exclude the expression of an opinion in *Dudley's case*. But Judge W. afterwards instructed the reporter, in publishing the cases, to state that he dissented from the decision of the court in the latter case, unless, in the meantime, he himself prepared and filed another opinion, expressing more fully his views.

COTTEN vs. BRADLEY.

[ACTION ON BILL OF EXCHANGE BETWEEN ENDORSERS.]

1. *Payment of bill by endorser.*—The payment of a bill of exchange by an endorser, or of a judgment which has been rendered thereon against a prior endorser, does not extinguish the bill as between him and such prior endorser, but gives him a right of action on it as fully as if he had never endorsed it.
2. *Presumption in favor of judgment.*—When a plea, which was struck out on motion in the primary court, is nowhere set out in the record, the appellate court will presume that it was of such character as justified that action.
3. *Construction of bill of exceptions.*—A recital in the bill of exceptions, that "the court decided" certain legal propositions, is not sufficient to show that such decisions were given as instructions to the jury.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. S. D. HALE.

THE complaint in this case was in the following words:
 "Joseph C. Bradley } The plaintiff claims of the de-
 } fendant thirty-eight hundred dol-
 } lars, due on a certain foreign bill
 } of exchange, which was drawn by David Larkin, dated Lar-
 } vs.
 } Edward Cotten.

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kinsville, Alabama, April 21, 1855, on Messrs. Bradley, Wilson & Co., New Orleans, La., for the payment of twenty-seven hundred dollars, four months after the date thereof, to the defendant, by whom it was endorsed to William R. Larkin, who endorsed it to Dillard & Ledbetter, who endorsed it to the plaintiff; and said bill, not being paid at maturity, was duly protested; of which the defendant had due notice. Said bill, with damages and interest due thereon, is still unpaid."

"On the trial of the cause," as the bill of exceptions states, "upon the issue joined on the pleas of payment and the general issue, (the plea of pendency of former suit being struck out on the motion of plaintiff,) the plaintiff offered in evidence the bill of exchange, with the endorsements thereon, on which the suit was founded, marked 'Exhibit A,' and the protest, marked 'Exhibit B;' and the defendant offered in evidence a transcript from the records of the district court of the United States at Huntsville, marked 'Exhibit C.'" (This transcript showed the rendition of a judgment by said district court, on the 15th November, 1855, in favor of the State Bank of South Carolina, as the endorsee of Joseph C. Bradley, against Dillard & Ledbetter, as the endorsers of the bill of exchange here sued on; the issue of an execution on said judgment, and the payment and satisfaction of the execution, except as to the costs.) "The defendant introduced R. C. Brickell as a witness, who was the plaintiff's attorney, and who testified, that said bill of exchange described and sued on in said transcript was the same bill here sued on; that suit was instituted on said bill, in said district court, against the defendant in this suit, prior to the institution of this suit, and that said suit in the district court is still pending. Said Brickell also stated, as the witness of the plaintiff, that said plaintiff paid said judgment against Dillard & Ledbetter; that the plaintiff in that judgment thereupon surrendered said bill of exchange to him; and that said suit in the district court was pending against said defendant for costs only. On this testimony, the court decided, that the

bill, endorsements, and protest, were sufficient to fix a *prima-facie* liability of the party,—it being admitted, that Larkinsville, to which the notice of protest was sent, was the post-office of the defendant; that the testimony of said Brickell in behalf of the plaintiff, although objected to by the defendant, was competent; and that although plaintiff was a subsequent endorser to Dillard & Ledbetter, and said transcript showed a satisfaction, still plaintiff was entitled to recover upon the testimony; to all which rulings and decisions of the court the defendant excepted."

The errors assigned are: 1st, that the court erred in striking out the plea of pendency of a former action; 2d, the decision of the court that the testimony of Brickell was competent; and, 3d, the decision that the plaintiff was entitled to recover on the testimony.

S. D. J. MOORE, for appellant.

R. C. BRICKELL, *contra*.

A. J. WALKER, C. J.—The payment of a bill of exchange, by an endorser to his endorsee, does not extinguish the bill, as between the endorser, who makes the payment, and the parties who stand before him in the order of liability.—Story on Bills, 541, § 422; Byles on Bills, m. pp. 174, 175, 176, 184; Chitty on Bills, m. p. 424, note 3; *Kirksey v. Bates*, 1 Ala. 303; *Edwards on Bills*, 534; *Earbee v. Wolfe & Clark*, 1 Ala. 366; *Wallace v. Branch Bank of Mobile*, 1 Ala. 565; *Herndon v. Taylor*, 6 Ala. 461; *United States v. Barker*, 1 Paine, 161; *Picquet v. Curtis*, 1 Sumner, 478; *Bell v. Morehead*, 1 Marsh, 158; 3 Kent, m. p. 89.

Notwithstanding the rendition of judgment against Dillard & Ledbetter, Bradley, the subsequent endorser, remained liable to his endorsee, and had a right to pay off the bill, to take it up, and to maintain an action against any of the prior parties. Instead of merely paying the bill of exchange, he satisfied a judgment which had been rendered against his endorser, in favor of his endorsee.

This payment necessarily involved a payment of the bill, upon which the judgment was founded. We cannot perceive any reason why Bradley should be deprived of his right of action against the prior parties, which would result from his paying off and taking up the bill, because he has, besides taking up the bill, satisfied the judgment. If the payment had been made by Dillard & Ledbetter, Bradley's endorsers, the property of the bill would have enured to them; but the payment is not by them, either in fact or by intendment of law, because it was made upon a judgment against them.

This is not the case of one man seeking by his voluntary act to make another his debtor. It is a legal right of an endorser to pay off and take up the bill; and thereupon he becomes the owner, and invested with a right of action against the respective parties standing before him, as completely as he was before he endorsed the paper. Having taken up the bill, he proceeds upon it, and does not sue as assignee of the subsequent party to whom he paid it. Dillard & Ledbetter were discharged from the judgment against them, by Bradley's payment of it; but we apprehend they were not discharged from liability upon the bill to their endorsee. But, if they were so discharged, it would not affect the liability of the antecedent parties. The discharge of a subsequent, does not discharge a prior party to a bill.—Byles on Bills, 190, 187; Chitty on Bills, m. p. 418. We think the argument for the appellant, that the plaintiff, upon the facts stated in the bill of exceptions, has no right of action, is altogether untenable.

[2.] We cannot discover that the court erred in striking out the plea of pendency of a former suit. The plea is not set out; and in the absence of all information as to what it contained, we must presume that it was of such character as justified the action of the court.

[3.] It is objected, that the court, in a charge to the jury, assumed the credibility of the parol evidence. We do not understand the bill of exceptions to show any charge by the court. It says, that the court *decided* certain

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things; but those decisions may have been announced incidentally during the trial, and not given as authoritative statements of the law to the jury. We cannot say that the court has given any erroneous charge to the jury, when it does not appear that the decision was given as a charge to the jury, or intended for their hearing.—*Greene v. Sims*, 16 Ala. 541; *Phillips v. Beene*, *ib.* 720; *Morrow & Nelson v. Parkman & Weaver*, 14 Ala. 769.

ALABAMA LIFE INSURANCE AND TRUST COMPANY vs. BOYKIN.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Acknowledgment of deed by married woman.*—The case of *Boykin v. Rain*, (28 Ala. 332,) as to the sufficiency of the acknowledgment of a deed by a married woman under the act of 1803, (Clay's Digest, 155, § 27,) re-affirmed.
2. *Constitutionality of act of 1858, relative to defective acknowledgments of deeds.*—The first section of the act of February 8, 1858, "to fix the mode of conveying the estates of husband and wife and for other purposes," (Session Acts 1857-8, p. 36,) which provides, that conveyances by husband and wife, theretofore made, shall not be held insufficient in law on account of defects in the certificates of acknowledgment, is unconstitutional.

APPEAL from the Circuit Court of Washington.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellant, against James M. Boykin, to recover the possession of a tract of land, with damages for its detention. The case was submitted to the court below on an agreed statement of facts, with leave to either party to appeal. The land in controversy, as appears from the agreed statement of facts, belonged to Sarah M. McGrew, having been devised to her by her father. She afterwards married Robert F. Hazzard, and, on

the 7th February, 1844, joined with her said husband in conveying the land by mortgage to the plaintiff. This mortgage was acknowledged by Mrs. Hazzard before a notary-public, whose certificate, appended to the deed, was in these words: "This is to certify, that Mrs. Sarah M. Hazzard, wife of Robert F. Hazzard, was examined and interrogated by me privately and apart from her said husband, Robert F. Hazzard, when she declared that she signed, sealed, and delivered the above instrument of mortgage deed, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purposes therein stated. In witness whereof," &c. The mortgage was assigned by the plaintiff to one Kernochan, at whose instance it was afterwards foreclosed in the chancery court at Mobile; the plaintiff becoming the purchaser at the register's sale, and receiving his deed. Mrs. Hazzard was divorced from her said husband in 1852 or 1853, and afterwards married the defendant, who went into the possession of the land claiming under her, and was in possession on the 3d September, 1856, when the suit was instituted. On these facts, the court instructed the jury to find a verdict for the defendant; to which charge the plaintiff excepted, and which is now assigned as error.

WM. BOYLES, and R. H. SMITH, for appellant.

DARGAN & TAYLOR, *contra*.

STONE, J.—In the case of *Boykin v. Rain*, (28 Ala. 332,) the same mortgage and certified acknowledgment were under discussion, which are the foundation of the present suit. In that case, the court held, that the certificate was not a substantial compliance with the requirements of the statute, and that consequently the title did not pass. That case was decided before I became a member of the court; but an application for a rehearing was submitted to the court after my election. The majority overruled the application, but I did not concur in their

conclusion. That decision has stood for seven years ; and although I am not convinced of its correctness, I think more evil would result from overturning it now, than from adhering to it. Few deeds, if any, will be found so entirely like the one there construed, as to constitute that case a dangerous precedent ; and uniformity of decision, in cases affecting rights of property, is one of the benefits that result from a well regulated judicial system. I adhere to that decision.

My brother, Hon. R. W. WALKER, fully concurs with me in the views above expressed.

[2.] The case of *Boykin v. Rain* standing as the law, it results that, up to February 8th, 1858, the title to the premises in controversy remained in Mrs. Hazzard, afterwards Mrs. Boykin, and those who succeeded to her title by operation of law. On that day, the act of the legislature was approved, "To fix the mode of conveying the estates of husband and wife, and for other purposes." Pamph. Acts, 36. It provides, "That no deed of conveyance of any land, heretofore *bona fide* made and executed by husband and wife, acknowledged by them before any judge, justice of the peace, notary-public, or other officer authorized by law, within this State, to take acknowledgments, and certified by him, shall be deemed or held invalid, or defective, or insufficient in law, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid in the certificate thereof ; but every such conveyance and assurance, so made, certified, and acknowledged, as aforesaid, shall be as good and effectual for conveying the estate and interest of said husband and wife, or either of them, to the lands mentioned in the same, as if all the requisites and particulars of such acknowledgment as heretofore required by law were fully set forth in the certificate thereof." It is contended for appellant, that this statute cures the defects in the certificate of Mrs. Hazzard's acknowledgment of the mortgage.

While we admit, that the legislature may change or

modify the rules of evidence, and make these modified rules applicable to existing rights, and even to existing suits ; we think this statute goes much farther. It attempts to make valid and effective that which was before inoperative and void ; effective to divest a title out of one, and vest it in another ; and this by a mere edict of legislation. It attempts to declare, not only what the law shall be, but what it has been. It has been well said, that, "to declare what the law *is*, or *has been*, is a judicial power ; to declare what the law shall be, is legislation."—*Per Thompson, J.*, in the leading case of *Dash v. Vankleek*, 7 Johns. R. 496.

We think, that to give this statute operation as its words import, would be to break down the dividing wall between the legislative and judicial departments of the government, which, by the 1st section of the 2d article of our constitution, are declared to be distinct. Moreover, we should invade that part of the 10th section of our bill of rights which declares, that the citizen shall not "be deprived of life, liberty, or *property*, but by due course of law." A legislative edict, which takes property from one, and gives it to another, is not "due course of law."—*Saddler v. Langham*, 34 Ala. 329 ; *Dorman v. The State*, *ib.* 216.

The mortgage, and its acknowledgment, being, up to February 8th, 1858, inoperative and invalid against Mrs. Hazzard, the title to the lands was in her a vested right. This it was not within the power of legislation to take away.—*Coosa River Steamboat Company v. Barclay*, 30 Ala. 126 ; *Dash v. Vankleek*, *supra* ; *Gilmore v. Shuter*, *Lev.* 27 ; *S. C.*, 2 Mod. 310 ; *Couch v. Jeffries*, 4 Burr. 2462 ; *Houston v. Bogle*, 10 Ired. 503 ; *McCrackin v. Hayward*, 2 How. U. S. 608 ; *People v. Sup. Westchester*, 4 Barb. Sup. Ct. 75 ; *Holmes v. Holmes*, *ib.* 300 ; *Wright v. Marsh*, 2 Green, (Iowa,) 118 ; *Norman v. Heist*, 5 Watts & Serg. 173.

We are aware that there are some decisions in Pennsylvania, which lay down a rule different from ours ; but we think them wrong in principle, and not to be followed.

The judgment of the circuit court is affirmed.

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A. J. WALKER, C. J.—I was on the bench when the opinion in *Boykin v. Rain* (28 Ala. 332) was delivered. That opinion had the full sanction of my judgment. The argument and investigation on this appeal has not shaken, but has served to confirm the conviction previously entertained. I hold, that the opinion in *Boykin v. Rain* was right; and I base my assent to an affirmance upon the intrinsic merits of the questions involved, and not upon the doctrine of *stare decisis*.

TUSKALOOSA WHARF COMPANY *vs.* MAYOR AND ALDERMEN OF TUSKALOOSA.

[ACTION ON LEASE FOR RENT RESERVED.]

1. *When exception is necessary; security for costs by corporation.*—The refusal of the primary court to dismiss, on motion, an action brought by a corporation, on account of the failure to give security for the costs at the commencement of the suit, is not revisable on error, unless an exception is reserved to it.
2. *Acknowledgment of service of complaint, and waiver of summons.*—Where the defendant acknowledges service of the complaint, and waives a summons, the cause stands in court, on the filing of the complaint, as if a summons had been issued on the day such acknowledgment and waiver were made.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by the appellee, a body corporate, to recover the sum of five hundred dollars, alleged to be due from the defendant for the rent of certain lands leased by the plaintiff. The minute-entry recites, that the complaint was filed in the clerk's office on the 24th September, 1860, and that two endorsements then appeared on it; one signed by E. Cooper, dated the 24th September,

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1860, being an acknowledgment of security for costs; and the other signed by W. Moody, as president of the defendant corporation, and dated the 29th August, 1860, being in these words: "The defendants waive a summons, and acknowledge legal service of this complaint." At the September term, 1860, as appears from the judgment entry, the defendant moved to dismiss the suit, on the ground that security for the costs was not given when it was commenced; but the court overruled the motion. At the March term, 1861, a judgment by *nil dicit* was rendered against the defendant. There is no bill of exceptions in the record. The errors assigned are: 1st, the overruling of the motion to dismiss the suit for want of security for the costs; 2d, the rendition of judgment at the spring term, 1861; and, 3d, the rendition of judgment on a complaint which showed no cause of action.

E. W. PECK, for appellant.—1. If the suit was commenced on the 29th August, when service of the complaint was acknowledged, then the motion to dismiss should have been allowed, because security for the costs was not given at the commencement of the suit.—Code, § 2398; *Steamboat Empire v. Ala. Coal Mining Co.*, 29 Ala. 698.

2. If, on the other hand, the suit was not commenced until the 24th September, when the complaint was filed in court, then the March term, 1861, was only the return term, and the judgment was premature.—Acts of Called Session, 1861, p. 3.

3. The complaint sets out a contract which is void under the statute of frauds.—Code, § 1551.

GOLDTHWAITE, RICE & SEMPLE, *contra*.—1. The refusal to dismiss the suit, for want of security for the costs, is not revisable in this court, because no exception was reserved to the ruling of the primary court.

2. It was not necessary to allege in the complaint that the lease was in writing, as required by the statute.—*Brown v. Barnes*, 6 Ala. 694.

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A. J. WALKER, C. J.—There was no exception to the refusal of the court to sustain the motion for the dismissal of the cause on account of the alleged failure to give security for costs before the commencement of the suit. It is, therefore, not revisable in this court. An exception is not necessarily dispensed with by the appearance of the objectionable ruling upon the record. To make a matter a part of the record is not the only office of an exception; it has the further object of admonishing the party, so that he may avoid putting the case on the point. *Chamberlain v. Masterson*, 29 Ala. 299; *Rives v. McClosky*, 5 S. & P. 330; *Tombeckbee Bank v. Malone*, 1 Stew. 269. Peradventure, he may avoid or waive the point, if admonished that it is to become a matter of revision in the appellate court; or the court, taking a more careful consideration of the subject, may change its decision. It is, therefore, not sufficient that the rulings of the court should appear upon the record, where they are not “intrinsic to the cause,” but arise incidentally in its progress. *Baylor v. McGregor & Darling*, 5 Porter, 103. But the rulings must be the subject of objections, or exceptions, in order that they may be revisable.

Accordingly, we find this court has decided, that, in the absence of exceptions, there can be no revision of the decisions of the subordinate courts upon the allowance of an amendment to pleading, (*Stewart v. Goode & Ulrick*, 29 Ala. 476; *Bryan v. Wilson*, 27 Ala. 208; *Simmons v. Varnum*, 36 Ala. 92;) or refusing to permit to defendant to plead over after a demurrer was sustained to his plea, (*Powell v. Asten*, 36 Ala. 140;) or striking out a plea as frivolous, (*Mahoney v. O'Leary*, 34 Ala. 97;) or upon the sufficiency of the answers of a party to interrogatories propounded by his adversary, (*Saltmarsh v. Bower*, 22 Ala. 221;) or upon the items of an administrator's account, (*Long v. Easley*, 13 Ala. 239; *King v. Cabiness*, 12 Ala. 598; *Clark v. West*, 5 Ala. 126; *Gordon v. McLeod*, 20 Ala. 242;) and upon numerous other questions of like character. Furthermore, we have examined several decisions in reference to the dis-

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missal of causes for the want of security for costs, and we find that, in all of them, there were bills of exceptions presenting the point of revision.—Ex parte *Camp*, 35 Ala. 143; *Forrester v. Forrester*, *ib.* 594; *Peavy v. Burket*, *ib.* 141; *Harper v. Columbus Factory*, *ib.* 127; *McAdams v. Beard*, 34 Ala. 418; *Duncan v. Richardson*, *ib.* 117; *Garrett v. Terry*, 33 Ala. 514; *Weeks v. Napier*, *ib.* 568; Ex parte *Jemison*, 31 Ala. 392; *Taylor v. State*, *ib.* 383. And we suppose that, in all other cases, in which this court has ever revised the action of the inferior courts upon such a subject, there were bills of exceptions. This uniformity of practice is a persuasive authority, entitled to much influence, if the question were otherwise doubtful. For these reasons, we decline to revise the decision of the court below upon the motion to dismiss for want of security for costs.

[2.] On the 29th of August, 1860, the defendant acknowledged service of the complaint, and waived a summons. This was nearly a month before the fall term, 1860, of the court. At the fall term, 1860, the complaint, with the endorsement, appears to have been in court; the plaintiff gave security for the costs, and a motion to dismiss was tried. Under the Code, (§ 2167,) a summons is not returnable to a term of the court, unless issued three days before its commencement. The point is made, that this suit stood as if it had been commenced by a summons, issued at the time when the complaint was returned into court; and that therefore this cause did not belong to the docket of the fall term, 1860. As a deduction from this point, it is argued that the cause did not stand for trial at the spring term, 1861; but that, under the act of February 8th, 1861, that was for it only the appearance term. Acts of the Called Session of January, 1861, p. 3. We can not sustain this argument. We think that the cause, at the fall term, 1860, stood in court as if it had been commenced by a summons issued on the 29th August, 1860, when the service of the complaint was acknowledged and the summons waived. We decide, therefore, that the

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case stood for trial at the fall term, 1860 ; and there was no prohibition in the act of 8th February, 1861, to its trial at the spring term, 1861.

We find no reversible error in the record, and, therefore, affirm the judgment of the court below.

WARFIELD vs. RAVESIES AND WIFE.

[BILL IN EQUITY TO SUBJECT WIFE'S SEPARATE ESTATE TO PAYMENT OF NOTE.]

1. *Statutory separate estate of wife ; how conveyed or charged.*—The separate estate of a married woman, held under the provisions of the Code, can only be conveyed by her and her husband jointly, by instrument of writing attested by two witnesses, (§ 1987,) and cannot be subjected in equity to the payment of her debts or contracts ; and, by virtue of section 1997, the same principle applies to property held by her under the acts of 1848 and 1850, where the debt or contract has been incurred or entered into since the 17th January, 1853, when the Code became operative.
2. *Constitutionality of law regulating conveyances.*—Section 1997 of the Code, so far as it requires conveyances of property held by the wife under the acts of 1848 and 1850 to conform to the provisions of the Code, is not violative of any constitutional provision.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. M. J. SAFFOLD.

THE bill in this case was filed, on the 30th April, 1858, by Hazael Warfield, against Paul Ravesies and Virginia, his wife ; and sought to subject the statutory separate estate of Mrs. Ravesies to the payment of a promissory note, executed by her and her said husband, dated December 15, 1856, payable, four months after date, to Daniels, Elgin & Co. or order, and endorsed by them to the complainant. The note was given partly for goods sold and delivered between the 8th June, 1853, and the 14th April, 1855, and partly for debts owing by Paul Ravesies alone.

The defendants were married on the 2d March, 1848 ; and the property of Mrs. Ravesies, consisting of land and slaves, belonged to her at that time. On final hearing, on pleadings and proof, the chancellor dismissed the bill ; and his decree is now assigned as error.

L.S. LUDE, for appellant.—1. It has been expressly decided by this court, that the separate estate of a married woman, held under the act of 1848, may be sold, charged, or disposed of by her, without the consent or concurrence of her husband.—*Hooper's Executor v. Smith*, 23 Ala. 639. As the property of Mrs. Ravesies was held under the act of 1848, and her marriage with her co-defendant took place prior to the passage of the Code or the act of 1850, the case must be governed by the act of 1848 ; and the case cited is conclusive of it.

2. The provisions of the Code, regulating the separate estates of married women, do not apply to separate estates held under former statutes. Section 1997 of the Code, which attempts to give this retroactive effect to its provisions, is unconstitutional, because it impairs the obligation of contracts, and interferes with vested rights. So far as rights of property are concerned, marriage is a contract within the meaning of the constitution ; and rights which have become vested by marriage, cannot be divested or affected by subsequent legislation. On this principle rest the cases of *Kidd v. Montague*, (19 Ala. 619,) *Manning v. Manning*, (24 Ala. 387,) and *Willis v. Cadenhead*, (28 Ala. 474,) and similar decisions in other States sustain the principle.—See *Ponder v. Graham*, 4 Florida, 44 ; *Holmes v. Holmes*, 4 Barbour, 301. Vested rights of property, acquired by virtue of a statute, cannot be divested or destroyed by a repeal or modification of the statute.—*People v. Supervisors of Westchester*, 4 Barbour, 70 ; 4 Barbour, 296 ; 10 Barbour, 244 ; *Norman v. Heist*, 5 Watts & Serg. 171 ; *Oriental Bank v. Freeze*, 18 Maine, (6 Shep.) 112 ; *Houston v. Bogle*, 10 Iredell, 504 ; *Wright v. Marsh*, 2 Iowa, 118.

3. Even if the provisions of the Code apply to the case, the complainant has a right to equitable relief. The general principle is recognized in this State, as elsewhere, that a married woman, owning a separate estate, without any restriction on her power to charge or dispose of it, may charge it with the payment of her husband's debts, or with any other contract or promise.—*Hooper v. Smith*, 23 Ala. 642 ; *Baker v. Gregory*, 28 Ala. 551 ; 17 Johns. 585 ; 3 Bro. C. C. 8 ; 9 Vesey, 369, 520. There is no provision in the Code, which expressly takes away this power to charge her estate in equity ; nor can any prohibition or restraint of that power be necessarily implied from the terms of section 1984. The Mississippi statute, under which were decided the cases cited for the appellee, expressly limited the mode of conveyance to the one specified in the statute.

GEO. N. STEWART, *contra*.—1. The complainant sues as assignee of the note, and not of the account which partly formed the consideration of the note ; and the note is shown to be without consideration as to the wife, and to have been signed by her without full knowledge of the facts.

2. The bill does not allege that the goods were sold on the faith and credit of the wife's separate estate. But, even if they were so sold, and were suitable to her condition in life, the complainant had a complete remedy by action at law ; and, consequently, he cannot come into equity.

3. Section 1984 of the Code prescribes the form and requirements of conveyances of the wife's separate estate ; and that mode must be pursued. To allow her to charge her estate in equity, or a creditor to subject it to the payment of a debt, would permit that to be done indirectly which cannot be done directly. Similar statutory provisions, in other States, have been held restrictive of the wife's power of alienation.—*Frost v. Doyle*, 7 Sm. & Mar. 74 ; *Franklin v. Beatty*, 27 Miss. 347 ; *Andrews v. Jones*, 32 Miss. 274 ; *Ritter v. Ritter*, 31 Penn. St. R. 396 ; 5 Texas, 153.

4. Section 1984 of the Code is applicable to this case by the express provisions of section 1997. No constitutional provision is infringed by this latter section, which, so far as this case is concerned, simply changes the mode of conveying property—*Drake v. Glover*, 30 Ala. 389 ; 1 Kent's Com. 455.

STONE, J.—It is settled in this court, by a line of adjudication, too long to be now open to examination, that a married woman, having a separate estate secured to her by contract, can bind that separate estate for the payment of her promises and engagements, unless the instrument creating the estate contain some clause restrictive of her right of alienation, or of anticipation. The following decisions are to this effect: *McCroan v. Pope*, 17 Ala. 612 ; *Bradford v. Greenway*, *ib.* 797 ; *Collins v. Rudolph*, 19 Ala. 616 ; *Collins v. Lavenberg*, *ib.* 682 ; *Crocker v. Clements*, 23 Ala. 296 ; *Ozley v. Ikelheimer*, 26 Ala. 332 ; *Wells v. Bransford*, 28 Ala. 200 ; *Baker v. Gregory*, 28 Ala. 544 ; *Caldwell v. Sawyer*, 30 Ala. 283 ; *Gunn v. Samuel*, 33 Ala. 201 ; *Walker v. Smith*, 28 Ala. 569 ; *Cowles v. Morgan*, 34 Ala. 535. See, also, *Blood v. Humphrey*, 17 Barb. 660 ; *Yale v. Denver*, 21 Barb. 286 ; *Cook v. Brook*, *ib.* 546 ; *Dickinson v. Abraham*, *ib.* 551 ; *Bell v. Kelly*, 13 B. Mon. 381 ; *Fears v. Brooks*, 12 Ga. 195 ; *Butler v. Robinson*, 11 Texas, 142 ; *Armstrong v. Stovall*, 26 Miss. 275.

In the case of *Hooper v. Smith*, (23 Ala. 639,) it was decided by this court, that a married woman, having an estate secured to her under the act "securing to married women their separate estates, and for other purposes," approved March 1st, 1848, (Pamph. Acts, 79,) can assign and transfer that estate to another, without the concurrence or co-operation of her husband, or can charge it for the payment of her debts and contracts entered into during coverture. Property held by the wife under the act of 1848, is certainly her separate estate ; and that statute confers no interest on the husband, nor does it contain any clause restrictive of the power of alienation or anticipation. A

wife has power to charge an estate containing these properties, if it be secured to her by contract; and we can perceive no good reason for laying down a different rule for the government of estates to which the law has affixed the same properties.—See *Southard v. Plummer*, 36 Maine, 64; *Southard v. Piper*, *ib.* 84; *Armstrong v. Stovall*, 26 Miss. 275; *Cummings' appeal*, 11 Penn. State R. 272; *Goodyear v. Rumbaugh*, 13 *ib.* 480; *Patterson v. Robinson*, 15 *ib.* 81; *Manderback v. Mock*, 29 *ib.* 43; Purdon's Digest, 570. See, also, *Key v. Vaughan*, 15 Ala. 500.

The case of *Blevins v. Buck*, (26 Ala. 292,) is not distinguishable in principle from the case of *Hooper v. Smith*, (*supra*,) and is strongly confirmatory of its correctness.—See act “to protect the rights of married women,” in Pamphlet Acts 1845–6, p. 23.

Estates held under the act “To alter and amend an act securing to married women their separate estates and for other purposes,” approved February 13, 1850, (Pamphlet Acts, 63,) and under the Code, (§§ 1982 and 1983,) stand on a different footing. Estates thus secured vest in the husband as trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs, or legal representatives, for the rents, income, or profits thereof.—Act of 1850, § 3; Code, § 1983. The act of 1850 (§ 5) provides, that property thus held “may be sold and conveyed by the joint deed of husband and wife; such deed to be executed, proved, and recorded, in accordance with the requirements of the laws now in force regulating conveyances of real estate.” The Code provides, that the property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing attested by two witnesses.—Code, § 1984. The change in the mode of conveyance effected by the Code, does not materially modify or impair the property-rights of either husband or wife, as secured by the act of 1850; and, consequently, sales or conveyances of property held under the act of 1850, made after the Code became operative, should conform to the rule prescribed by

the Code.—§ 1997; *Whitman v. Abernathy*, 33 Ala. 154.

Property held by the wife, either under the act of 1850, or under the Code, can not be said to be the separate estate of the wife in its broadest sense. The following are the arguments in support of this proposition :

First : The law points out the mode for the sale and conveyance of such estate ; and although there is nothing in either statute which is positively restrictive of other modes of conveyance, still the civil disabilities under which the wife labored at common law, and the utter inutility of the clause if we give it any other construction, induce us to regard this as an enabling clause, which, to effect a conveyance of title, must be conformed to.—*Whitman v. Abernathy*, *supra* ; *Greenwood v. Coleman*, 34 Ala. 150 ; *Ikelheimer v. Chapman*, 32 Ala. 676 ; *Peck v. Ward*, 18 Penn. State R. 506 ; *Mahon v. Gormly*, 24 *ib.* 82 ; *Ritter v. Ritter*, 31 *ib.* 396 ; *Heugh v. Jones*, 32 *ib.* 432 ; *Petit v. Fretz*, 33 *ib.* 118.—See, also, *Frost v. Doyle*, 7 Sm. & M. 74 ; *Berry v. Bland*, *ib.* 83 ; *Waul v. Kirkman*, 25 Miss. 619 ; *Franklin v. Beatty*, 27 Miss. 347 ; *Andrews v. Jones*, 32 Miss. 274 ; *Metcalf v. Cook*, 2 R. I. 355 ; *Miller v. Williamson*, 5 Md. 235 ; *Tarr v. Williams*, 4 Md. Ch. Dec. 68 ; *Williams v. Donaldson*, *ib.* 414 ; *Bailey v. Pearson*, 9 Foster, 77 ; *Cartwright v. Hollis*, 5 Texas, 153.

Secondly : The act of 1850, and the Code, give to the husband the right to manage and control the property of the wife, without liability to account with the wife, her heirs, or legal representatives, for the rents, income, or profits thereof. We have repeatedly held—too often for the subject now to be open to controversy—that, under this clause, the husband becomes the owner of the rents, income, and profits of the wife's estate.—*Weems v. Bryan*, 21 Ala. 302 ; *S. C.*, 25 Ala. 195 ; *Andrews v. Huckabee*, 30 Ala. 152 ; *Pickens v. Oliver*, 29 Ala. 528 ; *Whitman v. Abernathy*, 33 Ala. 160 ; *Rogers v. Boyd*, 33 Ala. 181 ; *Smyth v. Oliver*, 31 Ala. 39 ; *Cowles v. Morgan*, 34 Ala. 535 ; *Boaz v. Boaz*, 36 Ala. 334 ; *Alexander v. Saulsbury*, 37 Ala. 375 ; *Patterson v. Flanagan*, 37 Ala. 513 ; *Bennett v. Bennett*, 34 Ala. 53.

In the case of *Boaz v. Boaz*, (*supra*,) we said, "The legislature, in making the exemption from liability for the husband's debts, certainly did not look alone to his benefit. * * * The husband, therefore, holds the property as trustee, and is entitled to the income, merely because he is not required to account for it as trustee." We further said, the income is given to the husband, in order that he may, out of it, support the wife and children, &c. In that case, the husband had permanently abandoned the wife; and he was removed from the trust, because he had placed himself in a condition in which he could not properly administer the income and profits for the maintenance of the family.—See, also, *Patterson v. Flanagan*, *supra*.

In the case of *Boaz v. Boaz*, we did not overturn our former decisions, in which we had held that the husband was the owner of the rents, income, and profits. We simply charged his conscience with the execution of a duty, and ruled that, for placing himself in a condition in which he could not faithfully discharge it, he should be removed from the trust. This is, perhaps, the only coercive power which the courts could exert upon him in such a case.

The plain sequence of what we have said is, that, as to the estate of a married woman, held under the Code, or under the act of 1850, she does not possess an unlimited power of disposition, nor does she have the sole and exclusive use and benefit. The husband, so long as he remains her trustee, has a valuable vested interest, which must, and does, operate a restraint upon her power of alienation, or of present enjoyment by anticipation.—2 Bright on H. & W. 241; *Lee v. Muggeridge*, 1 Ves. & B. 118; *Ware v. Sharp*, 1 Swan, 489; *Baker v. Bradley*, 35 Eng. Law & Eq. 449; *Morgan v. Elam*, 4 Yerger, 375.

We hold, that a married woman, having an estate secured to her under the act of 1850, or under the Code, so long as her husband continues her trustee, cannot convey or charge her estate, unless she conform to the requirements of the statute.—Act of 1850, § 5; Code, § 1984.—See *James v. Fisk*, 9 Sm. & M. 144.

Mrs. Ravemies was married to her co-defendant on the 2d of March, 1848, and owned her property at the time of her marriage. The debt, which is sought to be fastened on her property, was contracted after the Code went into operation. Under these circumstances, the question may be asked, is her extent of ownership over the income and profits of her property to be determined by the act of 1848, or by the Code? Section 1997 of the Code declares, that "the provisions of this article take effect, and are operative on the estates of all married women, who have been married, or who have received property by descent, gift, or otherwise, since the first of March, one thousand eight hundred and forty-eight." We have several times quoted this provision of the Code, in considering questions arising under the statutes we are construing; but never has this question been considered by us, in any case which required its decision, except, perhaps, the case of *Weems v. Bryan*, 21 Ala. 302; and in that case, the principle was rather taken for granted, than considered.—See, also, *Rogers v. Boyd*, 33 Ala. 181. We do not propose now to announce any opinion on this question, as its decision is not necessary to the result we attain on a question hereinafter noticed. See *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 126; *Houston v. Bogle*, 10 Ired. 504; 1 Kent Com., marg. p. 455; *People v. Supervisors*, 4 Barb. 75; *Holmes v. Holmes*, *ib.* 300; *Norman v. Heist*, 5 Watts & S. 172; *Wright v. Marsh*, 2 (Iowa,) G. Green, 113; *Drake v. Glover*, 30 Ala. 382; *Boyd v. Harrison*, 36 Ala. 533; *Height v. Read*, 18 Barb. 165; *Peck v. Walton*, 26 Vermont, 86; *Blanchard v. Cumberland*, 18 Maine, 112.

Had the legislature the power to change the form of conveyance? In the case of *Drake v. Glover*, (30 Ala. 389,) we said, "It is unquestionably the law, that whatever title Mrs. Drake may have acquired in Louisiana, while she and her husband were domiciled in that State, would be unimpaired by the change of the matrimonial domicile, and the removal of the property to this State. *But the mode of conveying the property, after its removal and the change of*

domicile to this State, must be governed by the laws of this State, and not by the laws of Louisiana." It follows from the language we have italicized, that the "mode of conveyance" is not one of the rights secured by the contract, which legislation cannot impair or change.

In Vermont, the legislature enacted, that in order to convey "the rents, issues, or profits of, or any interest the husband may have in the real estate of the wife, * * * * the deed shall be executed by the wife jointly with the husband, and acknowledged by her," &c. The question arose in the case of *Peck v. Walton*, (26 Ver. 86,) whether this statute could operate on lands previously held by the wife, the marriage having been solemnized before the statute was passed. The court decided, that the statute did so operate, holding the following language: "But we do not regard this statute as having deprived the husband of any rights, which were not clearly subject to the control of the legislature. The husband is not, in any sense, deprived of the estate which he might have in any of his wife's property, or of the right to any estate in her prospective acquisitions. The statute only provides a special mode of conveying this particular estate; and of this no man can complain. The legislature may, at all times, prescribe the mode of conveying property, and especially real property."—See, also, *Oriental Bank v. Freeze*, 18 Maine, 112; *Potier v. Prejian*, 7 La. 301; *Foster v. Essex Bank*, 16 Mass. 270.

Without deciding, therefore, whether or not Mrs. Ravessies, under the operation of the act of 1850, and of the Code, has ceased to be the absolute owner of her estate and its income and profits, still the Code so far modifies the form of conveyance, as that, since it went into operation, she cannot charge it by any contract wanting the formalities therein prescribed.

The decree of the chancellor is affirmed.

WARFIELD *vs.* CAMPBELL ET AL.

[BILL IN EQUITY TO ESTABLISH SET-OFF AGAINST JUDGMENT.]

1. *Lien of garnishment.*—A judgment creditor, who sues out process of garnishment against the judgment debtor of his debtor, acquires a lien by the service of the garnishment, which will prevail over an equitable set-off afterwards acquired by the garnishee against the judgment.
2. *Lien of attorney.*—An attorney-at-law has a lien on a judgment or decree recovered for his client, to the extent of his fees for services rendered in the cause, which will prevail over an equitable set-off afterwards acquired by the defendant.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE original bill in this case was filed, on the 25th July, 1859, by Hazael Warfield, against David L. Campbell and Mrs. Mary J. Witherspoon; and sought to set off the complainant's interest in a judgment which Mrs. Witherspoon had obtained against said Campbell, against a judgment which Campbell had obtained against him, on the ground that Campbell was insolvent. Campbell's judgment against Warfield was recovered in the city court of Mobile, on the 25th March, 1859, and was affirmed by this court, on appeal, at its June term, 1859.—See the case reported in 35 Ala. 349. Mrs. Witherspoon's judgment against Campbell was rendered on the 18th June, 1858; and in May, 1859, she authorized Warfield, in writing, to collect this judgment, and to reimburse himself out of the proceeds for money which he had previously paid on her account. In February, 1860, B. Labuzan and Stewart & Brooks filed their respective petitions in court, asserting a lien on the judgment obtained by Campbell against Warfield, to the amount of their fees for professional services rendered by them, as attorneys for Campbell, in procuring that judgment. In March, 1860, an amended bill was filed,

bringing in Woodruff & Huntington as defendants; they having obtained a judgment against Campbell on the 4th March, 1858, and a judgment against Warfield, as the debtor of Campbell, on the 13th January, 1860. Woodruff & Huntington sued out a garnishment on their judgment against Campbell, which was served on Warfield on the 25th March, 1859, the same day on which Campbell's judgment against him was rendered; and Warfield filed an answer, admitting the rendition of that judgment, but stating that he had sued out an appeal from it; and the judgment against him as garnishee, in favor of Woodruff & Huntington, was not rendered until after the determination of that appeal.

On final hearing, on pleadings and proof, the chancellor held, that Woodruff & Huntington's lien on Campbell's judgment against Warfield, to the extent of their judgment against Warfield as the debtor of Campbell, was superior to Warfield's equitable set-off against Campbell; and that the liens of Labuzan and Stewart & Brooks, respectively, to the amount of their fees for professional services as attorneys for Campbell, must also prevail over the equity asserted by Warfield; but, as to the residue of the judgment against Warfield, the insolvency of Campbell being admitted, he allowed Warfield's equitable set-off, and perpetually enjoined the collection of such residue. From this decree Warfield appeals, and here assigns as error that part of the decree which gave to Woodruff & Huntington, Labuzan, and Stewart & Brooks, respectively, a lien superior to his equity.

JNO. HALL, for appellant.—1. The insolvency of Campbell gives chancery jurisdiction of this case, and Warfield's equity is superior to that of Woodruff & Huntington.—*Railroad Company v. Rhodes*, 8 Ala. 206; *Duncan v. Vanderburgh*, 1 Paige, 622; *Gridley v. Garrison*, 4 Paige, 647.

2. An attorney has no lien upon a judgment obtained by him for his client, for his fees, or compensation for his services in the cause, beyond the taxed costs.—*Long v.*

Lewis, 2 Stew. & P. 229-34; *Pindar v. Morris*, 3 Caines, 165; *McFarland v. Crary*, 8 Cowen, 253; 1 Paige, 622; 4 Paige, 647.

P. HAMILTON, for Woodruff & Huntington.—1. The judgment against Warfield, as garnishee, concludes him from setting up any defense of which he might have availed himself at law.—22 Ala. 586.

2. Woodruff & Huntington's judgment against Warfield, although rendered after he acquired an interest in Mrs. Witherspoon's judgment against Campbell, relates back to the service of the garnishment.—*Langdon v. Rairford*, 20 Ala. 532; *Skipper v. Foster*, 29 Ala. 330. The equities being equal, that must prevail which is prior in point of time.—2 Watts, 230.

GEO. N. STEWART, for the other defendants, cited *McDonald v. Napier*, 14 Georgia, 89; *Pope v. Armstrong*, 3 Sm. & M. 214; *Andrews v. Morse*, 12 Conn. 444.

A. J. WALKER, C. J.—The appellant by his bill asked to set off a part of a judgment wherein Mrs. Witherspoon is plaintiff and David L. Campbell defendant, against a judgment of Campbell against himself. Of the judgment in favor of Mrs. Witherspoon, he claimed to be the equitable owner to the extent of \$1071 61. The set-off was allowed, except as to a part of Campbell's judgment on the appellant, sufficient to discharge certain bills of cost, a judgment of Woodruff & Huntington, and the fees of counsel who procured the judgment of Campbell against the appellant. The argument here attributes to the chancellor an error only in restricting the set-off so as not to cover an amount sufficient to pay the judgment of Woodruff & Huntington and the counsel fees above specified.

Did Woodruff & Huntington, and the counsel of Campbell, have a right of satisfaction out of the judgment of Campbell against appellant, prior and superior to the right of the appellant to have Campbell's judgment against him

satisfied, by setting off against it his interest in the judgment of Mrs. Witherspoon against Campbell? Before this question can be decided, it must be ascertained at what time the interest of the appellant in the judgment against Campbell accrued. On the 19th May, 1859, Mrs. Witherspoon in writing authorized the appellant to collect her judgment on Campbell, and to retain such an amount as would reimburse him certain sums paid out by him for her. This transaction gave rise to the appellant's equitable interest in the judgment upon Campbell. It is true that, before that time, and on the 10th day February, 1859, the appellant paid for Mrs. Witherspoon certain sums of money, and he expected to reimburse himself from the money which might be collected from Campbell; but it is not alleged that Mrs. Witherspoon then authorized the appellant so to reimburse himself, or in any way transferred an interest in the judgment to him. Besides, if the appellant had, on the 10th February 1859, acquired an interest in the judgment corresponding with the sums then paid by him for Mrs. Witherspoon, the question would not be changed. For the sums so paid on the 10th February, 1859, were so small that, after the reimbursement of them to the appellant out of the judgment on Campbell, there would remain more than enough of that judgment to satisfy Woodruff & Huntington and the counsel fees above stated. It is certain, therefore, that the appellant did not acquire any interest, which would conflict with the claims of Woodruff & Huntington and the counsel of Campbell, until the 19th May, 1859.

The judgment of Campbell against the appellant was rendered on the 25th March, 1859; and on the same day a garnishment was issued in favor of Woodruff & Huntington, judgment creditors of Campbell, against the appellant, as Campbell's debtor, which garnishment was answered by appellant on 5th April, 1859. Afterwards, and in January, 1860, Woodruff & Huntington obtained judgment against the appellant, as the defendant in garnishment. This judgment the appellant sought by his bill to perpetually

enjoin, upon the ground that his equitable right of set-off was superior to Woodruff & Huntington's claim to a satisfaction of their judgment upon Campbell, out of the judgment of Campbell against the appellant.

[1.] By the garnishment, which was issued and answered before the appellant acquired his equitable set-off, Woodruff & Huntington obtained a lien, *pro tanto*, upon the debt due Campbell (their debtor) by the appellant. This lien would arise upon the service of the garnishment. It certainly attached in this case upon the filing an answer, which was a waiver of service. *Crawford v. Clute & Mead*, 7 Ala. 157; *Dove v. Dawson*, 6 Ala. 712; *Skipper v. Foster*, 29 Ala. 330. The garnishment gave to the creditors of Campbell a lien upon the judgment of their debtor against the appellant; and the appellant could not defeat it by acquiring afterwards a set-off. The chancellor therefore committed no error in giving precedence to the lien of Woodruff & Huntington over the appellant's set-off.

[2.] The remaining question to be examined is, whether the charges of Campbell's counsel, in procuring the judgment against the appellant in favor of Campbell, were entitled to satisfaction out of that judgment, in preference to the appellant's claim to have it appropriated to the judgment of Mrs. Witherspoon on Campbell. Besides the lien on papers, and upon funds collected, an attorney has a lien upon the judgment or decree recovered, for the services rendered in procuring such judgment or decree.—Cross on Lien, (32 Law Library,) 218; Montague on Lien, 53, 57; 2 Kent's Com. 641; Story on Agency, 507, § 383; *Ward v. Wordsworth*, 1 E. D. Smith, 598; *Turwin v. Gibson*, 3 Atk. 720; *Rooney v. Second Avenue Railroad Company*, 18 N. Y. (4 Smith,) 368; *Wilkins v. Batterman*, 4 Barb. 47; *Mitchell v. Oldfield*, 4 Term, 123.

In England, the legal profession has the two distinct departments of attorneys and advocates. Of the advocates there are two species, barristers and sergeants. In theory, the services of advocates are gratuitous, and their fees are *quiddam honorarium*. The attorney's fees are the only

charges which are actionable, or legally coercible. These are taxed as a part of the cost. It was a necessary consequence, that the attorney's lien applied alone to taxed cost. As there were no other charges cognizable by the courts, it was simply impossible to farther extend the lien. It is intimated by expressions made *arguendo* in *Long v. Lewis*, (1 St. & P. 229,) that the lien here can have no greater extent than the taxed cost, notwithstanding the principle of the common law is here repudiated, and the charges of counsel are with us the subject of contract, and, like charges for services in other departments of business, capable of enforcement in the legal tribunals. And many decisions in American courts deny the existence of any lien, where there is no taxation of costs on account of the attorney, and restrict it to the cost, where its taxation is authorized by law.—*Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 ib. 507; *Ocean Ins. Co. v. Ryder*, 22 Pick. 210; *Wright v. Cobleigh*, 4 N. H. 339; *Currier v. Boston & Maine Railroad*, 37 N. H. 223; *Hall v. Brinkley*, 10 Ind. 102, 18 U. S. Digest, 91, § 43; *Davenport v. Ludlow*, 4 How. Pr. R. 337; *Benedict v. Harlan & Wendell*, 5 ib. 347; *Walton v. Dickerson*, 3 Barr, 376.

We think these decisions proceed upon an incorrect view of the reason upon which the lien is restricted in England to the taxed costs. It was so restricted, because there was no right to legal coercion for the collection of any fees, save those taxed as a part of the cost. That reason failing, the result flowing from it ought also to fail. The attorney's lien was allowed, not because his costs were taxed; but it is founded in the natural equity which forbids that a party should enjoy the fruits of the cause, without satisfying the legal demands of his attorney. *Wilkins v. Carmichael*, Douglass, 100; *Cross on Lien*, 28; *Rooney vs. Second Avenue Railroad Co.*, *supra*. The taxed costs of the attorney, in England, had no merit or justice superior to the claim of counsel for a reasonable compensation in this day and country; nor did the former contribute more to the success of the party he represented, than

does the latter under our system. Every reason, therefore, upon which the lien was founded in England, applies to the counsel fees in this country; and, therefore, the lien should be incorporated in our jurisprudence, as a security for the compensation of counsel.

When the taxation of attorney's cost was abandoned in New York, and the rate of compensation was left by the law to be governed by contract, Judge Shankland and Judge Willard decided, that the lien no longer existed in that State.—*Davenport v. Ludlow*, *supra*; *Benedict v. Harlan & Wendell*, *supra*. But the question afterwards arose in the court of common pleas, and in the court of appeals of New York; and in both cases the decisions of Judge Shankland and Judge Willard were reviewed, in arguments which, it seems to us, conclusively refuted their reasoning, and the lien was allowed.—*Ward v. Wordsworth*, *supra*; *Rooney v. Second Avenue Railroad Co.*, *supra*. In other States, numerous cases are to be found, in which a lien in favor of counsel has been allowed, for the security of charges not taxed as cost.—*Pope v. Armstrong*, 5 S. & M. 214; *McDonald v. Napier*, 14 Geo. 89; *Carter v. Bennett*, 6 Florida, 214; *Andrews v. Morse*, 12 Conn. 444.

While we cannot affirm that there is any preponderance of authority in favor of the proposition, that the attorney's lien extends to the fees of counsel not embraced in the taxed costs, we feel constrained to maintain that proposition, because it best comports with the principle of justice out of which the attorney's lien sprung.

Upon the question, whether the attorney's lien is superior or subordinate to the defendant's right of set-off, there was in England, and is in this country, a singular contrariety of decision. Upon that question the courts of common bench and chancery, and the court of king's bench in England, and Chancellor Kent and Chancellor Walworth, in New York, ruled differently.—*Vaughn v. Davis*, 2 H. Bla. 440; *Mohawk Bank v. Burrows*, 6 Johns. 317; 2 Kent's Com. (marg. p.) 641; *Nicoll v. Nicoll*, 16 Wend. 446; *Story on Agency*, § 383; *Duncan v. Vanderburgh*, 1 Paige, 622:

Potter v. Lane, 8 Johns. R. 359; *Gridley v. Garrison*, 4 ib. 646. It is not necessary that we should consider it in this case. The set-off, as to which the controversy arises in this case, was acquired after the rendition of the judgment. To such a set-off it is plain that the attorney's lien must be superior, whatever may be the rule as to a set-off existing when the judgment is rendered. The authorities, which are above cited in this opinion, show that the attorney is regarded as an assignee of the judgment, at least at the date of its rendition, to the extent of his fees. Being an assignee at that date, he has an older equity than that acquired by a set-off of later acquisition; and the maxim, "*qui prior est in tempore potior est in jure*," applies in his favor.

The appellant has other matter of set-off against Campbell, which we have not noticed in this opinion, because its date is subsequent to the judgment of Campbell, and it is therefore controlled by the principles which we have announced.

Decree affirmed.

MCDUGALD'S ADM'R vs. CAREY.

[MOTION TO REVIVE APPEAL—CROSS MOTION TO DISMISS.]

1. *Succession to trust estate on death of trustee*.—The statute of Georgia, approved December 16, 1861, entitled "An act to provide for the appointment of new assignees and trustees in certain cases," as proved in this case, changes the common-law rule in reference to the succession to a trust estate on the death of the sole or surviving trustee under an assignment for the benefit of creditors, and authorizes the appointment of a new trustee, on the petition of two or more of the creditors, by the superior court of the county.
2. *Revivor of appeal*.—An express trust for the benefit of creditors having been created in Georgia, where the common-law rule in reference to the succession to trust estates has been changed by statute; and the trustee having died, pending an appeal from a decree in chancery obtained by him here,—the appeal must be revived against his successor in the trust, appointed under the statute in Georgia.

APPEAL from the Chancery Court of Russell.

Heard before the Hon JAMES B. CLARK.

THIS case was before the court at its January term, 1862, on a motion by the appellee to dismiss the appeal, on account of the failure to revive it, as required by an order of the court made at the June term, 1860; and on a cross-motion by the appellant, asking an extension of time within which to make the necessary revivor.—See the case reported, *ante*, pp. 320–23. At the present term, the appellant produced to the court a certified transcript from the records of the superior court of Muscogee county, Georgia, showing the appointment of William Dougherty, as the successor of Edward Carey, the deceased trustee, and also a certified copy of the statute of Georgia, under which the appointment was made; and moved to revive the appeal against said Dougherty. The statute referred to is entitled “an act to provide for the appointment of new assignees and trustees in certain cases,” approved December 16, 1861; and the first section is in the following words: “*Be it enacted, &c.*, “that in all cases of assignments for the benefit of creditors, heretofore or hereafter made, and in all cases of any trust, where the sole or surviving trustee or assignee shall have departed this life, or removed beyond the jurisdiction of the courts of this State, the superior courts of the several counties in this State shall have full power and authority, when sitting either as a court of law or equity, upon the petition of two or more of the parties interested in such assignment or trust, and on such notice as the court shall direct, in a summary manner, to appoint a new trustee or trustees, in place and stead of such deceased or non-resident trustee; and such new trustee shall have all the authority, and be subject to all the pains and penalties of such deceased or non-resident trustee or assignee; and all laws or enactments shall be as applicable, and in as full force, in respect to the new as the old trustee or assignee; and said court being hereby authorized, in his discretion, to require bond and security of such assignee or trustee.”

The appellee's counsel resisted the motion to revive, and moved to dismiss the appeal, because it had not been revived as required by the former orders of the court.

GOLDTHWAITE, RICE & SEMPLE, and GEO. D. HOOPER, for appellant.

W. P. CHILTON, L. E. PARSONS, and D. CLOPTON, *contra*.

STONE, J.—When this case was before us twelve months ago, we made the remark, that this trust was “created in the State of Georgia, and the suit was instituted for the purpose of collecting a debt due the trust, out of an alleged debtor's assets in the State of Alabama;” and we added, “The common law is presumed to prevail in Georgia; and by the common law, the trust title as to personalty passes, upon the death of the trustee, to his personal representative.” We then ruled, that a trustee in place of Mr. Carey should be appointed in this State, that the suit might be revived against him.

It will be observed, that this ruling of ours rests for its support on the legal presumption that the common-law rule prevailed in Georgia. A statute of the State of Georgia has been given in evidence before us, approved December 16th, 1861, which changes the common-law rule, and, in cases like the present, authorizes the appointment of a successor to the trustee, on certain specified proceedings had for the purpose. Proceedings had in the superior court of Muscogee county, Georgia, certified according to the act of congress, have also been given in evidence before us, which show that William Dougherty has been, by that court, appointed trustee in this case, in place of Edward Carey, deceased. The statute of Georgia declares, that “such new trustee shall have all the authority, and be subject to all the pains and penalties of such deceased or non-resident trustee or assignee.” These proceedings conform to the statute in every essential particular.

It is contended, that the new trustee, appointed as he was by the court, and under a statute of another State.

possesses no extra-territorial power, and cannot maintain a suit in our courts. The deed of assignment was made in Georgia, by and to parties resident therein; namely, by the Bank of Columbus, for the benefit of its creditors. It assigned all its effects, among which was a debt or debts due to the bank from Daniel McDougald. The present suit is instituted by the trustee to recover the said debt or debts of McDougald, out of assets that are in this State. We are not informed that any of the trust effects proper are in Alabama; but the averments of the bill tend to show that a resort to the estate of McDougald within this State is necessary to the collection of this demand against him. Under such circumstances, the law-appointed trustee, assignee, or syndic of another State, may maintain an action in this State, to recover a demand which is covered by the assignment.—*Hooper v. Tuckerman*, 3 Sandf. Sup. Ct. 311; *Hall v. Boardman*, 14 N. H. 38; Story's Conflict of Laws, § 420; *Wilson v. Matthews, Finley & Co.*, 32 Ala. 346-8, and authorities cited.

We have examined the cases of *Pickering v. Fisk*, (6 Ver. 102,) *Ingersoll v. Cooper*, (5 Blackf. 426,) *Willard v. Hammond*, (1 Foster, 382,) *Williams v. Mans*, (6 Watts, 278,) and are of opinion that they do not conflict with this view.

This appeal stands revived in the name of William Dougherty, trustee, as appellee.

SHERROD vs. SHERROD'S ADM'RS.

[BILL IN EQUITY BY EXECUTOR, FOR CONSTRUCTION OF WILL, ADMINISTRATION, AND SETTLEMENT OF ESTATE.]

1. *Bequest to grand-son, with limitation over on his death without wife or child.*—Where a testator bequeathed to his grand-son certain slaves, a specified sum of money, and a quantity of old sterling plate, and added to the bequest these words, "But, if said grand-son should die.

Sherrod v. Sherrod's Adm'rs.

leaving a wife, but no child, nor the descendants of any child, in that case it is my will, that his wife shall take the interest in the estate devised to him by me, to which the laws of Alabama would entitle her if he were seized and possessed of the same in fee-simple, and the balance of said estate I will to be divided equally between my three eldest sons or their families,"—*held*, that the absolute interest in the property vested in the grand-son, subject to be divested by the happening of the specified contingency; and that on his death, leaving neither wife, child, nor descendant, the title passed to his administrator, and the testator's three eldest sons took nothing.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed on the 25th January, 1851, by W. W. Watkins, as the sole surviving executor of the last will and testament of Benjamin Sherrod, deceased, against the legatees, devisees, and heirs-at-law of said testator, asking a judicial construction of the will, and the administration and settlement of the estate under the directions of the court; and an amended bill and bill of revivor was afterwards filed in the names of Samuel W. Shackelford and Charles F. Sherrod, as administrators *de bonis non*, with the will annexed of said testator. The testator died in February, 1847, having executed and published his last will and testament, which was duly admitted to probate after his death, and which contained a clause in the following words: "I will and bequeath to my grand-son, William S. Swoope, three thousand dollars, which I placed in the hands of his father at the time of his birth, to be kept at interest until he arrives at the age of twenty-one years, and then invested in land for his benefit; also, the following negroes," specifying them by name. "I hereby appoint my son, F. O. A. Sherrod, as trustee to take charge of the above-named negroes, and their future increase, at the division of my estate, and to employ them as he may think best, until the executors of Jacob K. Swoope shall provide a plantation on which to work them; and my said son Frederick shall be entitled, during the time he has the negroes, to one half of the clear profits of their labor. I

also will and bequeath to my said grand-son my old lot of sterling plate. But, if said grand-son should die, leaving a wife, but no child, nor the descendants of any child, in that case it is my will, that his wife shall take the interest in the estate devised to him by me, to which the laws of Alabama would entitle her if he was seized and possessed of the same in fee-simple; and the balance of said estate I will to be equally divided between my three eldest sons, or their families; the children of such of my said sons as may depart this life previously, or the descendants of such children, taking the share to which the deceased parent would have been entitled."

The testator had been twice married. By his first wife he had four children—namely, Felix A. M., Frederick O. A., and Samuel W. Sherrod, and Mrs. Swoope, the mother of William S. Swoope above named. By his second wife, who survived him, he had three children, all of whom were living at the time of his death. Felix A. M. Sherrod died before the execution of the testator's will, leaving several infant children. Frederick O. A. Sherrod and Samuel W. Sherrod survived the testator, but died before the bill in this case was filed, each leaving several infant children. William S. Swoope, who is named in the clause above copied, survived the testator, but died before the filing of the bill, intestate, under the age of twenty-one years, and without wife or child. The chancellor held, that the entire interest in the property bequeathed to William S. Swoope, under the above clause of the will, vested in him, and passed to his administrator on his death; and this part of his decree is here assigned as error by the children of the testator's three eldest sons above named.

WM. COOPER, and R. W. WALKER, for appellants.—The appellants insist that, under the bequest in controversy, William S. Swoope took only a life-estate, with a contingent remainder by implication to his children, if any, and a vested remainder to the testator's three eldest sons, or their families, defeasible *in toto* on the contingency of

Swoope's leaving children, and in part on the contingency of his leaving a wife but no children; that the bequest, considered by itself, is fairly susceptible of this construction; and that, when considered in connection with the other provisions of the will, the circumstances under which it was made, the relations of the several legatees to the testator, and the improbabilities and inconsistencies arising out of any other construction, (all of which, by rules universally recognized, are to be looked to in arriving at the intention of any particular clause,) no other construction can be sustained.—*Crowder v. Clowes*, 2 Vesey, 449; *Bean v. Hully*, 8 Term, 8; *Wainwright v. Wainwright*, 3 Vesey, 558; *Hingham v. Baker*, Cro. Eliz. 15; *Hutton v. Simpson*, 2 Vernon, 723; *Willis v. Lucas*, 1 P. Wms. 472; *Browne v. DeLoet*, 4 Bro. C. C. 535; *Ramsden v. Huzzard*, 3 Bro. C. C. 236; 1 Vesey & B. 466; *Hoskins v. Hoskins*, 9 East, 306; *Bamfield v. Popham*, 1 P. Wms. 54; *Robinson v. Robinson*, 1 Burr. 38; *Stanley v. Leonard*, 1 Eden, 87; *Doe v. Smith*, 7 Term R. 531; *Evans v. Astley*, 3 Burr. 1570; 2 Swans. 342; *Blackwell v. Bull*, 1 Keene, 176; *Townley v. Bolton*, 1 My. & K. 148; 5 Beavan, 142; 2 McCord, 45-62; 8 Iredell, 237; 5 Iredell, 414; 5 Dana, 442; 4 Rich. Eq. 276; 11 Harris, (Penn.) 31; *Sherratt v. Bentley*, 2 My. & K. 149; Dyer, 330; 2 Ventr. 347; 1 Roper on Legacies, 597, and cases cited; 2 *ib.* 1438-9, 1447-8; *Gibson v. Land*, 27 Ala. 127; *Woodley v. Findlay*, 9 Ala. 716; *Isbell v. Maclin*, 24 Ala. 315; Keyes on Chattels, §§ 323, 262. Many of these cases repudiate the old doctrine, which only allowed an unavoidable or necessary implication—where the inference was so plain as to be irresistible to the mind—and hold that an estate may be created, enlarged, diminished, or defeated, by implication, whenever it comports with reason, and with the general intent of the testator, as shown by the whole will.—See, particularly, *Sherratt v. Bentley*, 2 My. & K. 149; 4 Bro. C. C. 535, note, and cases there cited; 2 Roper on Legacies, 1447; Keyes on Chattels, § 262; 3 Vesey, 111. That the interest of the three eldest sons was a vested

defeasible remainder, see particularly 9 Ala. 716 ; 24 Ala. 315 ; 27 Ala. 117 ; 5 Iredell, 414 ; 1 Bro. C. C. 181 ; 1 P. Wms. 563 ; 4 Rich. Eq. 276. Even if their interest was contingent, the bequest is not to be construed according to the strict rules applicable to pure conditions precedent ; and it is not necessary that every particular circumstance should take place.—1 Roper, 751 ; *Avelyn v. Ward*, 1 Ves. sr. 420 ; *Holmes v. Craddock*, 3 Vesey, 321 ; *Pearsall v. Simpson*, 15 Vesey, 32 ; 2 Williams on Executors, 1089-90, last Amer. ed.

WALKER, CABANISS & BRICKELL, JAMES ROBINSON, and D. P. LEWIS, *contra*.—The will creates a vested legacy in W. S. Swoope.—*Gill v. Weaver*, 1 Dev. & Bat. Eq. 42 ; 6 Porter, 10, 507 ; *Farley v. Gilmer*, 12 Ala. 143 ; *Savage v. Benham*, 17 Ala. 127 ; 9 Vesey, 233 ; 11 Vesey, 498 ; 2 P. W. 626 ; 3 My. & K. 257 ; 11 Wendell, 260 ; 1 Jarman on Wills, 267, top ; 1 Roper on Legacies, 375-7, 553-4 ; 2 Fearné on Remainder, (ed. 1845,) 148, 163.

2. This vested legacy could only be divested by the happening of the contingency expressly provided for by the testator—viz., the death of the legatee, “leaving a wife, but no child.”—1 Roper on Legacies, 618, 782, top ; 2 Fearné on Remainders, 377-8 ; 5 Vesey, 207, 578 ; 3 Paige, 243 ; 6 East, 458. The specified contingency not having occurred, the court will not indulge in conjectures to supply supposed omissions.—3 Vesey, 317 ; 1 Jarman on Wills, 744-50 ; Roper on Legacies, 322.

3. The construction for which the appellants contend, would create a partial intestacy, and raise an estate by implication against the express words of the will, and which, if created by express words, could not be sustained. The doctrine of implication has never been carried to so great an extent.

A. J. WALKER, J.—F. O. A. Sherrod having died without ever having had the possession of the slaves, the contingency on which he was to share in the profits of their

labor is not presented; consequently, that feature of the bequest is to be left out of view in the consideration of the case. The bequest to be construed is a legacy, in the first place unqualified; to the grand-son, but by a subsequent provision made subject to this qualification, that if the grand-son should die, leaving a wife, but no child, nor the descendant of any child, then over to the persons in the proportions named. The grand-son having died in infancy, leaving no wife, nor child, nor the descendant of any child, to whom does the personalty bequeathed go? The chancellor decided, that it went to the grand-son's administrator, to be distributed among his next of kin. The appellants insist that it goes to the testator's three eldest sons, or their families. The construction producing that result is, that the grand-son took only a life-estate, with remainder to the three eldest sons, subject to be defeated *in toto* by the grand-son's leaving children, or their descendants, and in part by the contingency of his leaving a wife but no descendant from him. Rejecting that, we adopt as the true exposition of the clauses of the will in question the construction which gives to the grand-son the entire interest, subject, however, to be defeated in the contingency specified.

There is, in the first place, a clear and unambiguous gift of the absolute and entire interest. The language is, "I give and bequeath," &c. If the will had stopped with the former of the two clauses, no argument could have been made in favor of the proposition that the legatee took a partial interest. The case here, then, is one where an absolute gift is made, and a contingency is afterwards provided, in which the estate is to be defeated. Now, the rule is, that where there are clear words of gift, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that the interest shall cease.—*Harri-son v. Foreman*, 5 Vesey, 207. It is not to be inferred that the absolute gift is infringed, further than is expressed. The testator has with clearness and distinctness appointed

one contingency, upon which the interest given was to fail. Upon the death of the grand-son, leaving a wife, but no child, nor the descendant of any child, "*in that case*" there is a limitation over in defeasance of the estate. When the testator thus specifies a concurrence of circumstances, upon which the estate was to fail, how can it be said that the estate must fail upon the occurrence of only one of those circumstances? The death of the grand-son does not make "that case," in which the will directs the limitation over.

There is in the books a class of cases, where a bequest to one, in the event of the non-existence, or on the decease of another, has been held to indicate an intention to make the latter a prior object of the testator's bounty; as, for example, a devise to A, upon the death of B. In those cases, the antecedent estate is not given; and there must, therefore, be an intestacy, unless the courts imply a bequest of it. A bequest has, therefore, been implied in many cases, to him upon whose death the subsequent estate is to arise. The implication must not rest upon conjecture; it must be necessary. The inference must be so plain as to be irresistible to the mind.—*Brummel v. Prothers*, 3 Vesey, 111; 1 Jarman on Wills, 465; 2 Lomax on Executors, 19; *Browne v. DeLoet*, 4 Bro. C. C. 535, note *a*; 2 Roper on Legacies, 1497–1498; *Chum v. Respass*, 1 Monroe, 25. If a devise be made to the heir, after the death of another, the inference is irresistible, that the testator intended the latter to take a life-estate; for otherwise the heir would take by inheritance, before the event upon which the devise to him was to take effect. The authorities upon this subject are numerous, and sometimes conflicting, and it is not necessary here for us to go into them. The principle upon which they proceed, has no application here.

The cases collected upon the briefs of appellants' counsel, on the subject of implication, are all referrible to the doctrine stated above. Thus, in *Crowder v. Clowes*, (2 Vesey, 449,) a life-estate in the testator's niece was implied from a bequest over to the person who might be entitled to the

real estate, if she should die unmarried. So, in the case of *Wainwright v. Wainwright*, (3 Vesey, 558,) a similar decision was made, in reference to a bequest over, in the event of the death of one attaining the age of twenty-one years. So, also, in *Hingham v. Baker*, (Cro. Eliz. 15,) a life-estate was implied in favor of the wife, from a devise after her death to the son. To the same effect is the case of *Hutton v. Simpson*, 2 Vernon, 723. A review of all the authorities referred to would but afford cumulative illustrations of the same principle. The application sought to be made of those cases, would involve a perversion of them. They do not afford any authority for the cutting down an estate into a life-estate. If it be conceded, that the grand-son would take a life-estate by implication from a bequest over after his death, it is not at all a sequence, that an estate actually bequeathed will be diminished into a life-estate, by implication from a bequest over, in the event of there being a wife, but no child, at the time of his death. Such an implication would simply add a condition not authorized by any thing the testator has said.

The wife was, upon the occurrence of the contingency, to receive the same interest to which the laws of the State of Alabama would entitle her, if the legatee were seized and possessed of the same in fee-simple. This provision is not sufficient to defeat the estate given. It does not authorize the inference that the testator designed to give his grand-son an estate for life. If that effect were allowed, it would not harmonize with the preceding clause. Perfect harmony is secured between that and the clause which makes the bequest, by attributing to it a design to meet the contingency of an alienation by the grand-son. If the grand-son should leave a wife, but no descendant, then the limitation over was to take effect, just as if he were at the time of his death seized and possessed of the same in fee-simple, whether he was then actually seized and possessed of the same or not. Or, it may be that the words, without observing their technical meaning, were used by way of distinction to an estate defeasible upon a subsequent

condition. Under either view, that harmony with the other provisions of the will, for which courts always strive, is observed. See 1 Jarman on Wills, 415-416. But, aside from that consideration, it is impossible that those words can be regarded as manifesting, with that degree of certainty and clearness which the law requires, the intent to defeat an estate clearly granted by a previous clause.—*Harrison v. Foreman, supra.*

If we concede, that the testator's grand-son took only a life-estate, it would result, that there is an intestacy as to the remainder ; the contingency not having occurred, upon which the limitation over was to take effect. It would not be a necessary implication from anything contained in the will, that the testator designed his three eldest sons to take the remainder. We may find grounds in the will for conjecturing that the testator designed to follow the legacies to the death of the first taker, and see that they did not pass away from the class of children to which the first taker belonged ; and we might then conjecture that he had that design in reference to the legacy to his grand-son. But it would be mere conjecture at last. The testator has not said so, nor has he said anything from which it can be inferred. Certainly, the court can not resort to conjecture, when the terms of the will are of intelligible import. To do so would be to make a will, conforming to what it is supposed the testator intended—not to search for the intention in the construction of what is said.—See *Manigault v. Bailey*, 1 Bailey's Eq. 298. It is not the province of a court to incorporate into a will provisions which it may be supposed the testator would have adopted if they had occurred to him. Nor is it the province of the court to provide for a contingency, neglected in the will, because there is room for conjecture that the testator would have done so, had he anticipated it.—1 Jarman on Wills, 744-50 ; *Parsons v. Parsons*, 5 Vesey, 578 ; *Holmes v. Craddock*, 3 Vesey, 317 ; Roper on Legacies, 322, 326, ch. 21, § 9.

If, then, it be granted that the grand-son took only a life-estate, it would not open the door for the three eldest sons

to come in. The will gives them an interest in a portion of the property, in a certain contingency, which never happened; and if every intendment is made for the appellants, we can attain nothing more than conjecture that they were to take in any other contingency. Therefore, in deciding that the grand-son took the entire or absolute interest, to be defeated only in the specified contingency, we avoid a partial intestacy, which it is evident the testator did not contemplate. The case of *Read v. Snell*, 2 Atkyns, 642, is not like the case in hand. There, the devise was to R. or the heirs of her body; and if she died, leaving no heirs of her body, then over. "Heirs of the body" was construed to mean children, and "or" was construed to mean "and;" so that the devise, thus understood, was to R. and her children living at her death, and it was therefore decided that R. took only a life-estate.

As Chief-Justice RICE, being related to one of the administrators of Benjamin Sherrod's estate, sits in the case only by consent of the parties, we deem it proper to observe that the foregoing opinion has the entire approval of every member of the court.

The decree of the chancellor is affirmed.

NOTE BY REPORTER.—The foregoing opinion was delivered at the January term, 1858. A rehearing having been granted, on the application of the appellants' counsel, the cause was held under advisement until the January term, 1863, when the following opinion was delivered by Mr. Justice STONE. The annexed brief is an abstract of the argument submitted by the appellants' counsel on the rehearing.

GEO. GOLDTHWAITE, for appellants.—1. If the words, "leaving a wife," where they occur in the bequest, were used by the testator as words of condition, he must have intended to make the substitution of his sons to any portion of the prior gift dependent on the accident of the grand-son leaving a widow. It is incredible that any sane man should have made such a will. What possible motive

or reason can be assigned for it? To make provision for the grand-son's widow out of the gift to the grand-son, in case he died without children, and to bestow all the balance of the property, after deducting the provision for such widow, on certain of the testator's own children, is intelligible to every one; but, for the testator, after making this disposition, to add, "in case my grand-son leaves no widow to provide for, my children shall have nothing," is intelligible to no human being. It is not merely irrational and absurd, but unnatural and startling. It makes the testator not only perpetrate the absurdity of making the gift over to the sons depend upon a matter with which it can have no possible connection, but reverse the principles of human action, by making a contingency operate against the sons which should operate in their favor. It makes provision for the three sons, although the widow may survive, and takes it from them when there is no widow to provide for. A construction which leads to results so absurd and irrational, will not be adopted if it can be avoided.—*Pearsall v. Simpson*, 15 Vesey, 29-33; *Key v. Key*, 19 Eng. Law & Eq. 617-24; *Hart v. Fulk*, *ib.* 438-43; *McKinnon v. Sewall*, 6 *ib.* 327.

Can any other construction be given? Did the testator intend that the gift to the grand-son should not be divested, unless he left a widow, and died without descendants? His purpose was, in case the grand-son died without descendants, to make provision for his widow, if any, and also for the three eldest sons. This is the precise case for which he has provided, and which, if it had happened, would have divested the original bequest. That he both said this, and meant this, is certain; but, did he also mean that, if the grand-son died without descendants, no provision should be made for the sons? The bare statement of the proposition is almost as monstrous and startling, as the will itself becomes under its adoption. If the testator, after using the words of absolute gift to the grand-son, had said, "but, should my grand-son die, leaving a widow but no descendants, in that case I give to my three oldest

sons," &., entirely omitting the gift over to the widow, it may be conceded that leaving a widow would be an event which must happen, to divest the original gift; but why? because, the gift to the widow being omitted, the two contingencies designated could only be referred to the gift to the sons. However unnatural and absurd the disposition would have been, there would be no escape from it, for no other meaning could possibly have been given to the words. But here there is no such necessity. The gift to the widow follows the words "leaving a wife," not immediately, but directly after the only condition, so far as she was concerned, which was imposed; and it is perfectly certain that, as to her, they were not used, in any proper sense, as a condition on which she should take, but were merely intended to designate a person for whom, if living at the death of the grand-son, provision was to be made out of the prior gift, in case he died without descendants. The testator thought of and expressed the case of there being a widow, with reference to the provision he intended to make for her, and not as a condition, or contingency, on which the gift over to the sons was to depend.—*Murray v. Jones*, 2 Vesey & B. 313; *Horton v. Whitaker*, 1 Durn. & East, 346.

This construction is exemplified by a devise to A in fee, and at his death, without issue then living, one-half to his widow, if any, and the other half to B. Could there be any doubt that, in such case, the executory devise to B would depend alone upon the contingency of the death of A without issue living? The present case is an absolute bequest to the grand-son, and, in case of his death without descendants, to his widow, if any, and the residue to the three sons. Omit the gift to the widow, and it is like a devise to A, and at his death, leaving a widow, but without descendants then living, to B; in which case, the devise over would depend on the two contingencies.

The case of *Pearsall v. Simpson*, *supra*, tends strongly to confirm the view last insisted on. There, the legacy was in trust to pay the interest to the separate use of A. for life, and after her decease, as to the capital, for her children;

if no children, to pay the interest to her husband during his life; "and from and after his decease, in case he shall become entitled to the interest," then to pay the principal to the first cousins of the testatrix. A died, leaving no issue, nor any husband, he having died before her; and it was contended, that the legacy over to the cousins did not take effect, because the husband of A. never became entitled to the interest,—the event upon which alone the legacy was given over. Sir William Grant said: "The only question is, whether Richard Stafford taking for life, was a condition to the cousins of the testatrix taking the capital. That would be a most absurd condition, undoubtedly; for there is no sense or reason in making the right of her first cousins depend upon a fact totally disconnected with any intention as to them. What was it to them, whether Richard Stafford took or not? Such a construction is not to be unless absolutely necessary." "It was doubtful whether Richard Stafford would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest; but, if he does, she makes the death the period at which her first cousins are to take. It is not a condition precedent, but fixes the period at which the legatees over shall take, if he ever takes. The words will bear that construction, and the reason of the thing seems to require it."

Murray v. Jones, supra, in its facts, as well as the reasoning of the learned judge who delivered the opinion, also bears a striking analogy to the case at bar. In that case, the question was as to the construction of a residuary clause, after a bequest to the testatrix' younger children; "but, in case I shall have but one child living at the time of my decease," or all but one die under twenty-one, or unmarried, to another family; which was construed not to be a condition. The master of the rolls (Sir Wm. Grant) uses this language: "In my opinion, the first case put by Lady Bath—namely, that of her having but one child living at her death—does not contain a condition that she shall have one child living at that time. At first sight, the proposition

relative to the having but one child may seem to include in it, and to imply, the having one. That is true, if the proposition be affirmative; but by no means necessarily so, if the proposition be hypothetical or conditional. The proposition that A has but one child, is as much an assertion that he has one, as that he has no more than one; but, when the having but one is made the condition, on which some particular consequence is made to depend, the existence of one is not required for the fulfillment of the condition; unless the consequence be relative to that one supposed child. As if I say, that in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist, to be entitled to the portion; but, if I say, that in case I have but one child of my own, I will make provision for the children of my brother, it is quite clear, that my having but one child is no part of the condition, on which the supposed consequence is to depend. My having one child of my own, would rather be an obstacle, than an inducement to the making of a provision for the children of another person. The case I guard against, is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition, on which the intended provision for my brother's children was to depend. The plain sense of the proposition is, that, unless I have more than one, the provision shall be made."

If the testator in the present case had said, "but, if my grand-son shall die, leaving only a widow to provide for, I will make a certain provision for her, and also for the three sons, out of the prior gift," holding the words "only a widow" to exclude all except descendants of the grand-son, the case would be identical with the case of *Murray v. Jones*. And this is precisely what the testator did mean, when he used the words "leaving a wife but no descendants." The gift over was in part to the widow, the balance to the three sons, in case the grand-son died without descendants. What the testator was guarding against, as to the ulterior gift, was not the existence of the widow, but the grand-son leaving descendants.

The construction insisted on by the appellants, is also established by the fact, that the gift over to the sons is *residuary in its character*. The intention of the testator was, as has been said, in case the grand-son died without descendants, but leaving a widow, to substitute her and the three sons in the place of the grand-son. He gives the widow the portion which she would be entitled to, as such, by the laws of Alabama, if the grand-son was the absolute owner, and the "balance" (residue) to his three oldest sons, &c. The testator, in the gift over, makes the widow the special legatee, and the three sons the general legatees. The presumption as to residuary gifts is, that the testator prefers the general legatee to all the world except the special legatee; that but for the sake of the particular or special legatee, he would have given all to the residuary or general legatee. It is upon this presumption that all lapsed legacies fall into the residuum.—*Cambridge v. Rous*, 8 Vesey, 15.

If the testator intended the words "leaving a wife" to operate as a condition, he intended that the three sons should take no portion of the prior gift, if the grand-son left no widow. The intention of the condition, and the intention of the residuary clause, cannot exist together. They are irreconcilable. The testator could not have intended to say, "were it not that there may be a widow of my grand-son to provide for, I would, in case of his death without descendants, give over all I have bequeathed to him, to the three sons;" and in the same breath to say, "but, should he leave no widow, the sons shall have nothing." The whole clause would be an unmeaning, senseless, contradictory jargon. By the residuary clause, the testator shows, not that the existence of the widow is the inducement for giving to the sons any portion of the prior gift, but that she is the obstacle which prevents him from giving them all; that the provision for the widow was the only limitation on his bounty to the sons.

But it may be urged, that in the case of the devise to A. in fee, and on his death without issue living, one half in

fee to his widow, if he leaves a widow, and the other half to B., although it may be clear that the testator intended the limitation over to B. should vest upon the sole contingency of the death of A. without issue; still, that on a devise to A. in fee, and on his death, leaving a widow, but no issue living, then, in fee, one half to the widow, and the other half to B.; while the result in the two cases is the same, on the death of A. leaving a widow, but no issue, yet, from the collocation of the words in the last case, it is apparent that the testator intended to provide for the one case only which he specified; and that whatever he might have done, had it occurred to him that A. might die, leaving neither widow nor issue, the omission to provide for that case is fatal; that the testator having only declared certain events upon which the original devise was to be divested, it remains in force until these events happen. To this position an answer is furnished by the principles of necessary implication, and the presumption of the residuary clause.

The principle of implication, as applied to wills, is illustrated by the cases of *Jones v. Westcomb*, Ch. Pr. 316; *Guliver v. Wickett*, 1 Wils. 105; *Statham v. Bell*, Cowp. 40; and *Murray v. Jones*, *supra*. In the first case, the devise is to A. (the wife of the testator) for life, and at her death, in fee, to the child of which she was *enciente*; and if the child should die before twenty-one, in fee, one-third to A., and the remaining two-thirds to B. and C. The wife was not *enciente*; there was no child; but the court held the devise over to the wife good. The event expressly declared and provided for, did not happen; the case of there being no child born was a *casus omissus*; it had not occurred to the testator, and was not provided for. But the court implied, that, although the case which the testator supposed did not happen, he would have made the same devise over to the wife in the case which did happen, had it occurred to him. There could have been no absolute certainty that he would have done so, for many testators might give their wives more, if about to become mothers, than if not in

that situation. *Gulliver v. Wickett*, *supra*, was upon the same will; and *Statham v. Bell* identical in principle. These cases are referred to, principally, for the purpose of showing that necessary implication, as it is termed, is not always an implication which is irresistible; as where, upon a devise to the heir on the death of A., it is implied that A. takes for life; for, in that case, as the heir does not take until A. dies, if A. does not take, no one can.

Blackstone says, that necessary implication in wills "may be only strong probability," (2 Black. Com. 381;) and Lord Eldon, in *Wilkinson v. Adam*, (1 Vesey & Bea. 421, 466,) defines the same words "not natural absolute certainty, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." Mr. Jarman, in language which conveys the precise idea more definitely and distinctly, states the principle thus: "Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift; *i. e.*, to arise on an event which determines the interest of the prior devisee or legatee; and it happens that the prior gift fails *ab initio*, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's life-time. It then becomes a question, whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of a doubt, that, if asked, whether, in case of the prior gift failing altogether for the want of an object, he meant the ulterior gift to take effect, he would have answered in the affirmative." *Jones v. Westcomb*, with the other cases last cited, as well as *Murray v. Jones*, are referred by that author to this principle.

The principle being settled, let it be applied to the clause in question; and to present it more clearly, take the naked case of direct gift from the testator, without the intervention of a prior gift. This may appropriately be done, because the rule as to devises which take effect or are

divested upon condition is the same. In one case the heir, and in the other the prior devisee, is defeated. In the first, the estate does not arise, until the contingency on which it depends happens; and in the last, the original devise remains in force, until the happening of the event which is to defeat or divest it. The construction of the same words in either case would be the same, unless varied by some other part of the will. Thus, if a testator was to say, "should I die leaving a widow, but no descendants, in that case, I give her one-half of my estate, and the other half to my nephew;" the question as to the nephew taking, in case the testator died leaving neither widow nor descendants, would be the same which would be presented had the testator used the same words in defeasance of a prior gift.

In the cases of *Jones v. Westcombe*, and *Gulliver v. Wickett*, *supra*, the supposed case, on which the devise over to the wife was made, was the birth of a child, and the child not attaining twenty-one years; the actual case was the having no child. The implication, based upon the devise in the supposed case, was, that the testator would have made the same devise in the real case—that, as he gave the wife a portion of his estate, if he had a child, and the child died before twenty-one, he would have given her the same, if he had known there would be no child. In *Murray v. Jones*, the supposed case was that of the prior legatee leaving but one child; the implication was, that, as the testatrix made provision for the nephews if there was but one child, she would do no less for them, in case there was no child to provide for. So, in the case given above, the question would assume this shape: If a testator, in case of his dying without descendants, but leaving a widow, makes a certain provision for his nephew as well as his widow, would he make at least the same provision for his nephew, if there was no widow to provide for? Had the question been put to a testator, could there, to use the language of Mr. Jarman, "have been a shadow of a doubt, that his answer would have been in the affirmative;" or, in the words

of Lord Eldon, is there not so "strong a probability" that he would have done so, that "the contrary cannot be supposed?"

It is true, that the cases cited in illustration of the doctrine of implication have sometimes been referred to the principle of a substantial performance of the condition imposed; that what has happened is equivalent to that which the testator supposed would happen; but they cannot be rested upon this principle, without assuming or implying that the testator would have regarded the real as equivalent to the supposed case; which is not absolutely certain, so that it comes to implication at last. *The testator thought of the one case only, and the devise was made with reference to that case alone; the case which did happen never occurred to him, and he made no provision for it; but, by what he did in the supposed case, the implication is made as to what he would have done in the real case, had it occurred to him.*

The case of a direct devise, without the intervention of a prior absolute gift, has been taken to illustrate the doctrine of implication, for the reason, that the error, if error there be, in the opinion of the court, is in the too strict adherence to the letter, rather than the spirit of the rule, as laid down in *Harrison v. Foreman*, (5 Vesey, 207,) in these words: "It is perfectly clear that, where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that the interest shall not arise." In the application of this rule to the case at bar, the opinion on the former hearing holds, in effect, that the bequest to the grand-son being in words of absolute gift, it can only be defeated in the very case in which it is declared by the testator it shall be defeated; that the case thus declared being the leaving a widow and no descendants, and that case not having happened, as a necessary consequence, the prior gift to the grand-son is not defeated. The result is, that while it is conceded that the heir may be defeated by implication, the prior legatee or devisee never can be; for,

if the very case happens which is declared by the testator, there is no implication; if it does not, implication cannot be resorted to. In *Harrison v. Foreman*, the fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties; and *in case of the death of either of them in the life-time of A.*, then the whole to the survivor *living at her death*. P. and S. *both* died in the *life-time of A.*; and Sir R. P. Arden, the master of the rolls, held, that the gift to P. and S. was a vested interest, to be divested upon the contingencies declared in the will; and as these contingencies never happened, the original bequest remained in force. The question as to the defeasance of the vested interest by implication did not arise, for there was no ground to rest it upon. The case supposed and provided for, it is true, did not happen: the case which did happen—that of P. and S. *both* dying in the life-time of A.—may not have occurred to the testator, and certainly was not provided for by him; but it was impossible to do more than *conjecture* how he would have given the fund, had the case which actually did happen, occurred to him. And this is the difference between that case and the present. That the prior devisee cannot be defeated by implication, although the heir may be, seems to be against all reason; and no adjudged cases have been cited, which directly sustain such a doctrine. *Murray v. Jones*, (*supra*,) and the others cited for the appellants, are directly against it; for, in none of them, did “the very case” declared by the testator, upon which the gift over was to take effect, happen.

The rule is laid down by Mr. Jarman, thus: “That estates, once vested, will not be divested, unless all the events which are to precede the vesting of the substituted devise happen,” (1 Jarm. on Wills, 756,) which gives full scope for implication, as well as construction; and the same learned author gives a warning note, against extending the case of *Harrison v. Foreman* too far, referring to the more recent decision of *Joslin v. Hammond*, 3 Myl. & R. 110. *Holmes v. Craddock*, (3 Ves. 317,) another authority cited in the opinion of the chief-justice, may well be

questioned. Mr. Jarman does question it, and holds it irreconcilable with *Pearsall v. Simpson*, (*supra*,) and that class of cases, and there is little doubt that Sir Wm. Grant would have decided it differently.—1 Jarm. on Wills, 746, note i. Conceding, however, the correctness of each of these decisions, and of every other case cited in the opinion, there is not one of them which goes so far as to hold, that a prior absolute gift cannot be divested by implication; and if the words used by the master of the rolls in *Harrison v. Foreman*, were intended, as probably they were, to assert no more than the general proposition, that an absolute bequest remains in force until the title of the substituted legatee becomes complete, by the happening of the events which are to divest the original bequest, he states the rule accurately; or, if spoken with reference to the case before him, are correct; but, if intended to be taken as an unbending and universal rule, subject to no exception, they go further than the case before him warranted, and are not sustained either by principle or authority.

If the principles of implication have been correctly stated and applied, it follows necessarily, that, in case of a devise in fee to the testator's grand-son, and on his death, leaving a widow, but no descendants, then, in fee, one half to the widow, and the other half to the son of the testator; on the death of the grandson, leaving neither widow nor descendants, the son would take by implication; and it would be a singular anomaly, if, in the substituted devise, the son occupied the position of residuary, and the widow that of special devisee, the son should take nothing. But, in truth, this position, instead of weakening the implication, makes it irresistible; for, as has been seen, the presumption which attaches to every residuary bequest is, that the testator prefers the general to all the world but the special legatee. This presumption is inevitable: the testator can mean nothing else; and applying it to the devise in question, it is the same as if the testator had expressly declared, that, were it not that there might be a widow of the grand-son to provide for out of the prior

gift, he would have given all to the three sons. This presumption is, of itself, a conclusive answer to every argument on behalf of the appellees; for it shows with unerring certainty the intention of the testator, in the case which has happened, to give over the whole of the prior gift to the three sons; that with reference to that case, he did not use the words "leaving a wife," as a condition; and at the same time, marks the distinction between *Harrison v. Foreman* and the present bequest, as just the difference between conjecture and irresistible implication,—doubt and absolute certainty.

By giving effect to this presumption, the intention of the testator is sustained, without violence to the words; every absurd, startling and monstrous feature disappears; every seeming inconsistency is reconciled; and the well settled principles of implication are sustained. The blood of the testator in the line of the original legatee has become extinct, and the estate returns to his own blood, subject alone to that provision for the widow of the grand-son which our own law deems most just. No words could be used which express this intention more clearly, and no disposition made which bears upon its face the impress of a more considerate forethought and comprehensive justice. By interpreting the words of the master of the rolls in *Harrison v. Foreman*, not with reference to the particular case in which they were used, but as an inflexible rule of universal application, the whole doctrine of implication as to the defeasance of vested interests is repudiated, the adjudications of the ablest judges overruled, and the presumption of the residuary clause, not merely defeated, but reversed,—made to speak directly the opposite of what was intended by the testator. Holding the words "leaving a wife" to be a condition intended by the testator to operate against the divestiture of the original bequest on the grand-son dying without descendants, goes still further, and, in addition to the results just adverted to, assumes that the same words were used in a double sense; the one rational, the other absurd. In the one sense, the disposi-

tion is marked by consideration, reason, and justice; in the other, the self-same words serve only to give expression to an act of unspeakable folly, startling inconsistency, and unnatural caprice.

STONE, J.—It is not denied that Wm. S. Swoope took a vested estate under the will of his grand-father; but it is contended that, under the obvious intention of the testator, as expressed in his will, and by necessary implication arising from its language, the gift over to the eldest three sons of the testator was not made to depend on the contingency of said Swoope's dying, leaving a wife surviving him; that that was rather an obstacle in the way of the gift over; that the real and only condition on which the gift over was made to depend, was that the grand-son, dying, should leave neither child, nor descendant of a child, surviving him.

The authorities conducing to support this proposition are the following :—*Murray v. Jones*, 2 Vesey & B. 313; *Pearsall v. Simpson*, 15 Vesey, 29; *McKinnon v. Sewell*, 5 Sim. 78; *Hulton v. Simpson*, 2 Vern. 722; *Gulliver v. Wickett*, 1 Wils. 105; *Jones and Westcomb*, 1 Eq. Cases Abr. 245; *Andrews*, dem. *Jones and Fulham*, 2 Eq. Cases Abr. 264; *Earl of Newburgh v. Eyre*, 4 Russ. 454; *Robinson v. Robinson*, 1 Burr. 38-50; *Doe*, ex dem. *James v. Hallett*, 1 M. & S. 124; *Hill v. Smith*, 1 Swanst. 195; *Doyne v. Cartright*, 1 Coll. 482; *Wainwright v. Wainwright*, 3 Vesey, 558; *Key v. Key*, 19 Eng. L. & Eq. 617.

Murray v. Jones is probably the strongest of these cases for appellants. In that case, Lady Bath, by will, gave the income of the bulk of her estate, first to her father, and then to her husband, successively, for life; and at the death of the survivor, gave the property to the children of Lady Bath; but gave it over to Mrs. Markham, now Mrs. Fawcett, and her children, upon any one of the following events: 1st, in case Lady Bath should have but one child at the time of her decease, be the same a son or daughter; 2d, in case she should have two or

more sons, and no daughter or daughters, living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one; 3d, in case she should have two or more daughters, and no son or sons, living at the time of her decease, and all of them but one should die under twenty-one, and unmarried; or, 4th, in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or, being a daughter, should die under that age, and unmarried. Lady Bath died, never having had a child; and the property was decreed to Mrs. Fawcett, formerly Mrs. Markham, and her children; Sir Wm. Grant, master of the rolls, remarking, that the true condition on which the gift over was to take effect, was not that Lady Bath should have *one* child, but that she should not have *more* than one at the time the gift over was to be enjoyed. The argument of Sir Wm. Grant in this case is very vigorous; and from his acknowledged ability, it is contended that it should have great weight.

Looking into the cases, a list of which is given above, it will be seen that the presumed intention of the testator, not clearly expressed, on which some of them are made to rest, or the necessary implication, mentioned in the books, brought to the aid of others, was in every instance indulged, not to defeat a vested estate, but, in most of them, to prevent an intestacy. The exceptions are the following:

Hill v. Smith, 1 Swanst. 195, in which it was attempted to divest the title of the testator's son, a primary legatee, on some confusion and inaccuracy in the language of the will. The court, from the general tenor and context of the will, came to the conclusion, that the testator did not intend to cut down his son's estate on the event which had happened.

Doe v. Hallett, 1 M. & S. 123, is very like the last in principle. The testator, by mistake, described a certain person as an only son, when there was another living. He then made provision for such [supposed] only son, and for the other sons afterwards to be born. This family was the primary object of his bounty; and the first son dying, the

second son was declared entitled to the devise. This was pronounced to be the intention of the testator, gathered from the language of his will.

In each of these cases, it will be perceived, that the effort was made to exclude the primary object of the testator's bounty; in one of them, his heir-at-law. To accomplish such object, requires express language, or implication amounting to such "strong probability of an intention, as that the contrary can not be supposed."—1 Jarman on Wills, m. p. 465, and note.

Another case relied on for appellants is *Hart v. Tulk*, 19 Eng. L. & Eq. 438. In that case, the court became satisfied that there was an obvious mistake in the draft of the will, by employing the word "fourth," where "fifth" was intended. This conclusion was attained, by considering the whole tenor of the will, which evidently contemplated equality of benefit to each and every of the testator's children; and correcting this mistake, carried into effect the general intent of the will. There is much in the will which tended to show the mistake.

We have stated the extreme cases on one side, which are presumed to make in favor of the appellants. There are many cases of a contrary tendency. In the case of *Shuldham v. Smith*, (6 Dow. 22,) testator had devised real estate in trust to pay the clear rents, issues, and profits, and in certain proportions, to certain persons in the will mentioned, for life; and then proceeded to devise as follows: "And from and after the death of the survivor of them, the said L. S." &c., (naming the several persons to whom the above life-interests were given,) "then I give and devise, all and singular, the said manor, messuages, lands, &c., unto all and every the children of my late sister, E. C. by her three several husbands," (naming them,) "that shall be then living, and their heirs and assigns forever, equally to be divided between them as tenants in common, and not as joint tenants; and if there should be but one such child, and no issue of any of the other children then living, then, and in that case, I give and devise all my said real

estate in Ireland, unto such surviving child, his or her heirs and assigns, forever. At the death of the surviving annuitant, there was only one child of the sister E. C. then living; but there was issue of several of the other children then living. It was held by the house of lords, in concurrence with the unanimous opinion of the judges attending, that there was an intestacy, from the death of the surviving annuitant; the event which happened not having been provided for.

In *Doe, ex dem. Radcliffe v. Bagshaw*, (6 Term Rep. 512,) the devise was to Margaret, an only child, for life, remainder to the first son of her body, *if living at the time of her death*, and the heirs male of such son, and, in default of such issue male, remainder to R. B. Margaret had an only son, who died during the life of his mother, leaving a son. It was held, that Margaret took only a life-estate; that neither her son nor grand-son, took anything under the will, but the devise over to R. B. took effect.

Of similar import are the following cases: *Wingrove v. Palgrave*, 1 Pr. Wm. 401; *Holmes v. Craddock*, 3 Vesey, 317; *Doe, dem. Vessey v. Wilkinson*, 2 Term Rep. 209; *Doe v. Jessep*, 12 East, 288; *Doe v. Rawding*, 2 B. & Ald. 441; 1 Jarman on Wills, m. pp. 744 *et seq.* See, also, *Brown v. Clark*, 3 Vesey, 166; *Scott v. Chamberlayne*, *ib.* 302.

In *Harrison v. Foreman*, (5 Vesey, 207,) the court said: "It is perfectly clear that, where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which it is declared that interest shall not arise." This sentence is somewhat obscure; but the context shows, that the writer meant to say, that an absolute gift shall not be defeated, unless the case has happened in which it is declared that *the estate shall cease*.

Under the will of Benjamin Sherrod, an absolute estate vested in Wm. S. Swoope, subject to be defeated on a contingency. Has the event happened, on which it was declared the estate should cease? It has not literally hap-

pened; but we are asked to presume that the testator did not mean precisely what he said, because we can not perceive any reason why the fact that Wm. S. Swoope should have and leave a wife surviving him, should incline the testator to make larger provision for his own children, than he would have made if his grand-son had left neither wife nor child. We concede this. But then a testator may give no reasons, or very foolish reasons, for his acts; yet, if he have testable capacity, his will must be carried into effect. Or, he may omit to provide for many possible events, when it is morally certain that, if such contingencies had occurred to him, he would have made provision for them; still, courts can not supply such omissions. It is our province to expound, not to make wills.

We adopt as our own the language of Chancellor Johnson in *Manigault v. Deas*, 1 Bailey's Eq. 302:—"If speculations on the subject of intention were admissible, I should probably arrive at the conclusion to which this argument leads. Ignorant of the feelings which might have operated on the testator, I am ready to confess that I can see no reason" [why the leaving a wife should be a condition of the gift over"]. "But we are forbidden by the rules of law to indulge in conjecture. The testator's power of disposition over the property is unlimited. If he will, he may indulge his partialities, and his prejudices, and exercise wisdom or folly in the disposition of his estate."

If we enter upon the broad sea of speculation as to the probable intention of the testator, whither shall we be drifted, and where find a safe anchorage? When the testator made his will, it was possible that Wm. S. Swoope would die unmarried. It was also possible that he might die leaving a wife and children, or a wife without children, or children without a wife surviving. It was also possible that he might leave children, who might all die unmarried, and leaving no descendants. The will makes express provision for only one of these contingencies. It is said there is an implication to meet one of the other contingencies—the one which has happened. How about the others?

Suppose the grand-son had died, leaving children and no wife; would there then have been an implied gift over? No one will contend for such result. The absolute title was not intended to be divested by that event. Suppose he had died, leaving children, and they had all died under age, and without issue; what then? See note to *Holmes v. Craddock*, 3 Vesey, 321.

We have indulged in these reflections to show the great peril that must attend every step we take, when we travel out of the language of a will in pursuit of a conjectured intention of the testator. The will must be expounded by its own terms, and not by the after-accidents that may befall the devisees, unless those accidents are provided for by the will. The rules of construction, as compiled by that accurate writer, Mr. Jarman, forbid the latitude now invoked.—2 Jarman on Wills, m. p. 742. He says:

XI. "That in general, implication is admissible only in the absence of, and not to control an express disposition."

XII. "That an express and positive devise can not be controlled by the reason assigned, or by subsequent ambiguous words," &c.

XIII. "That the inconvenience, or absurdity of a devise, is no ground for varying the construction, when the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences of his disposition, a reason for varying it," &c.

XXI. "That the construction is not to be varied by events subsequent to the execution," &c.

The rule as to implications is declared in the following authorities: *Gardner v. Sheldon*, Vaughn, 261; *Bamfield v. Popham*, 1 Pr. Wms. 56; *Brown v. DeLaet*, 4 Bro. C. C. 435, and note (a); 1 Jarman on Wills, 435, and note 2; 2 Lomax on Ex'rs, 19; *Rathbone v. Dyckman*, 3 Paige, 9. Necessary implication is defined to be, "such a strong probability that an intention to the contrary can not be supposed." It is sustainable only on the principle of carrying into effect the intention of the testator.

The following authorities seem to us to be precisely in

point, and to show that the chancellor did not err in the decree rendered in this cause: Devise and bequest for the benefit of a daughter; "and from and after the decease of my said daughter, in trust to convey and assign the said several last mentioned freehold and household estates, and the said £1000 stock, unto the heirs, executors, and assigns of my said daughter, for and according to all my estate and right therein respectively. Nevertheless, in case my said daughter shall intermarry, and have no child or children, then the said estates and money in the funds shall belong to my son George Wm. Russen; or, in case of his decease before my said daughter, then to such child or children as he may happen to leave," &c. After the death of testator, the said George Wm. died without issue, having made a will, disposing of the property; and subsequently Mary Ann Russen, the daughter of David Russen, the testator, intermarried with one Noble, and was his wife at the time of the trial; but she had no child. The court said: "I think that, upon the construction of this part of the will, independently of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators, and assigns; and that Mrs. Noble has an absolute estate, subject to be defeated by the executory gift over. And if this be so, the question is, whether the particular event in which the vested estate was to be divested, can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion that the gift over was to take effect only in the event of Mrs. Noble's marrying, and dying without issue, in the lifetime of her brother, or of such child or children as he might happen to leave; and as he died in her life-time, and had no child, I think that the contingent executory gift cannot take effect."—*Jackson v. Noble*, 2 Keene, 590.

A testator devised to Thomas Cooke, and added: "But my will is upon this further condition, that in case the said Thomas Cooke shall die *an infant, unmarried, and without issue*, then I do hereby give and devise" [the premises]

“unto the said Wm. Cooke and his three other children,” &c. Thomas Cooke entered upon the premises, lived to attain his majority, married, and died, never having had issue. The question was, whether Wm. Cooke and his three other children took under the will. It was ruled that they did not. Lord Ellenborough, in delivering the opinion of the court, held the following language: “If the court should confine the estate’s going over to a *dying without issue*, they must reject the words ‘infant, unmarried.’ If they should retain them, and read them as the counsel for the defendant contended they should be read—viz., ‘If he die an infant, or die unmarried, or, being married, die without issue,’ this would be, in effect, reading the will as if it had given the estate over on any one of these single events.”—*Doe, ex dem. Everett v. Cooke*, 7 East, 271.

So, in the case of *Williams v. Chitty*, (3 Vesey, 545,) where there was a devise to A. and her heirs; but, if she dies *under twenty-one and unmarried*, to B. and her heirs. A. died in the life-time of the testator, under twenty-one, and without issue, but had been married. It was conceded in the argument that B. did not take under this clause of the will.

See also, *Humberstone v. Stanton*, 1 Ves. & B. 385; and *Joslin v. Hammond*, 3 Myl. & K. 110.

The decree of the chancellor is affirmed.

R. W. WALKER, J., having been of counsel, not sitting.

ROBERTS vs. STRANG, ADRIANCE & CO.

[ACTION AGAINST PARTNER, ON NOTE EXECUTED BY PARTNERSHIP.]

1. *Release of partner, or covenant of creditor not to sue, not available as defense to co-partner.*—An agreement by a creditor to discharge one partner from liability on a partnership debt, (or a covenant not to sue him for twenty years,) on his giving personal security for the payment of a portion of the debt, does not release or discharge the other part-

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ners; nor can the latter, when sued by the creditor, claim either a discharge from the debt, or a reduction of it beyond the amount assumed by the surety, by showing that partnership assets beyond that amount, which they had previously delivered up to the discharged partner, to be appropriated to the payment of the partnership debts, were, by the agreement between that partner and the creditor, assigned to the surety for his indemnity, and were afterwards disposed of by him and the surety.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellees, against Joel A. Roberts, as a partner in the firm of Lewis & Porteous; was founded on two promissory notes, executed by said Lewis & Porteous, payable to the plaintiffs,—one for \$1,441 97, dated November 15, 1859, payable eight months after date; and the other for \$1,324 33, dated February 1, 1860, and payable eight months after date; and was commenced on the 22d October, 1860.

“On the trial,” as the bill of exceptions states, “after the plaintiffs had introduced their evidence, the defendant proposed to prove the following facts: That the cause of action was an indebtedness of the mercantile firm of Lewis & Porteous, of which firm he was a partner; that said firm, some time before this suit, concluded to close up its business; that he (defendant) left the store, and all the goods, effects, notes, and accounts, in the hands of George Porteous, one of the partners, for the purpose of paying off the debts; and that said Porteous, instead of fairly appropriating the said goods and effects to the objects intended, and to the relief of all the partners, by the advice and aid of the creditors of the firm, (including the plaintiffs,) so acted as to obtain his own discharge, and to convert a large portion over and above to his own private use, in the following manner: After the defendant had left the store, the said creditors sent an agent to Mobile, fully authorized to settle or compromise with said Lewis & Porteous for their indebtedness aforesaid; and said agent, after taking account of stock, and remaining in the store for several days examining matters, entered into an agreement with said Por-

teous and one Caleb Price, (the latter not being a member of the firm of Lewis & Porteous,) to this effect: that Porteous should give his notes, endorsed by said Price, for forty cents on the dollar of said indebtedness; whereupon the creditors released and relinquished to said Porteous all right to resort to any of said goods and effects, and that they should be mortgaged to said Price, to secure his endorsement, and Porteous was to be discharged from the whole indebtedness. At the instance, however, of Porteous and his counsel, it was concluded that, instead of a technical release, (which was agreed on and really intended,) a covenant was written, and signed by the creditors, not to sue said Porteous in twenty years. In accordance with this agreement, said Price endorsed the notes, and took a conveyance, or lien, on said effects, the proceeds of which were to pay said notes, and held as well by the promise of the creditors as from said Porteous; and Porteous and Price have since disposed of their right and lien in all said effects. The amount of said goods and effects, so turned over by the creditors to Porteous and Price, was between seven and ten thousand dollars more than the forty per cent. assumed by said Price; all of which was lost to the defendant.

"Thereupon, it was agreed between the parties, that such a state of facts should, for the purposes of this case, be considered as proved, and in evidence before the jury, so far as the same were competent and admissible by the rules of evidence; that the court might instruct the jury as to the legal effect thereof, and that either party might except to such instructions. The court thereupon instructed the jury, that such a state of facts constituted no defense to the action, and no ground for a reduction of the plaintiffs' demand, except that the taking of the notes, endorsed by Price, for forty per cent. of the indebtedness of the firm, was a discharge of such indebtedness to that extent." The defendant excepted to this charge, and he now assigns it as error.

JNO. T. TAYLOR, for appellant.—1. Giving time to Por-

teous, without the consent of Roberts, was injurious to the latter, and discharged him.

2. A fraudulent combination with one partner, by which he is discharged in consideration of the goods of the firm, operates a discharge of the other partners.

3. The plaintiffs' received from Porteous, and turned over to Price, a large amount of partnership assets, over and above the sum assumed by Price; and their demand should at least be reduced, as against the defendant, with the amount of that excess.

J. L. SMITH, *contra*, cited the following cases: *Dean v. Newhall*, 8 Durn. & E. 171; *Lane v. Owings*, 3 Bibb, 247; *Shed v. Pierce*, 17 Mass. 628; *Couch v. Mills*, 21 Wendell, 424; *Rowley v. Stoddard*, 7 Johns. 209; *McClellan v. Cumberland Bank*, 24 Maine, 566; *Catskill Bank v. Messenger*, 9 Cowen, 37; *Chenango Bank v. Osgood*, 4 Wendell, 607; *Durell v. Wendell*, 8 N. H. 369; *Lancaster v. Harrison*, 6 Bing. 731; *Jolley v. Forbes*, 2 Brod. & Brig. 46; *McAllister v. Sprague*, 34 Maine, 296.

STONE, J.—In the case of *Browning v. Grady*, (10 Ala. 999,) this court said: "The agreement of the creditor to discharge one partner, on his securing the payment of a portion of the debt, but reserving the right to proceed against another partner, does not operate to discharge the latter." Of similar import are the following cases: *Couch v. Mills*, 21 Wendell, 424; *Dean v. Newhall*, 8 Term Rep. 168; *Rowley v. Stoddard*, 7 Johns. 207; *Lane v. Owings*, 3 Bibb, 247; *Catskill Bank v. Messenger*, 9 Cowen, 37; *Bank of Chenango v. Osgood*, 4 Wendell, 607; *Durell v. Wendell*, 8 N. H. 369; *McClellan v. Cumberland Bank*, 24 Maine, 566.

We find nothing in this record which takes this case out of the operation of the rule thus stated. All that the creditor did, was to bind himself not to sue the appellant's co-partner, Porteous, in twenty years. The assignment of the merchandise to Price was only intended as a security

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to him, against the liability he incurred for Porteous on forty per cent. of the debts due to Strang, Adriance & Co. The goods were not, except to that extent, placed beyond the reach of Roberts, the appellant; and every cent of the debt secured by Porteous, was, to that extent, a benefit to Roberts. If Porteous, or Porteous and Price conjointly, afterwards disposed of those goods without paying the partnership liabilities, we can not perceive how this result can be traced to any agency of Strang, Adriance & Co., or how they are to be held accountable for such disposition.

The judgment of the circuit court is affirmed.

EX PARTE HAUGHTON.

[APPLICATION FOR HABEAS CORPUS.]

1. *Constitutionality of vagrant law.*—Sections 3795-6-7-8 of the Code, in reference to proceedings against vagrants, are unconstitutional, because no appeal from the judgment of the justice is provided.

APPLICATION by William W. Haughton for the writ of *habeas corpus*, or other remedial process, to procure his discharge from confinement in the county jail of Mobile. The petition, with the accompanying exhibits, showed that the petitioner was arrested, on the 1st December, 1862, under a warrant issued by a justice of the peace, on the complaint of a woman who claimed to be his wife, and who alleged that he had abandoned her and his family, leaving them without an adequate support; that the justice, after hearing the evidence, ordered him to give bond, with sureties, for his good behavior, as prescribed by section 3796 of the Code, or, in default of such bond, to be committed to jail; that he thereupon sued out a *habeas corpus* before the Hon. C. W. RAPIER, a judge of the circuit court; and that the said judge, on the hearing, refused to discharge him.

Ex parte Haughton.

THOMAS A. HAMILTON, for the petitioner.

C. F. MOULTON, *contra*.

A. J. WALKER, C. J.—Sections 3794, 3795, 3796, 3797, and 3798 of the Code, pertain to the subject of vagrancy. They define the description of persons who are vagrants, authorize their arrest upon a justice's warrant, and, upon a conviction before the justice, require that they should give bond for good behavior, or be imprisoned for ten days ; and further prescribe that, upon a second conviction, they shall be committed to jail for twenty days, and fed on bread and water. These sections contemplate proceedings which are final in their character, and not merely preliminary steps to a prosecution in the circuit court. Whether the object of the proceeding is merely preventive, or both preventive and punitive, may admit of debate ; but we do not deem it necessary to consider that question. It is sufficient for the purposes of this opinion to ascertain that, whatever may be the purpose of the statute, the judgments of the justices under it are final, and not preliminary to a prosecution. From such judgments, the 8th section of the 5th article of the constitution of this State requires, that the right of appeal should be secured, under such rules and regulations as may be prescribed by law. No appeal being provided for, the law is unconstitutional and void.—*Tims v. State*, 26 Ala. 165. The circuit judge should, for this reason, have declared void the proceedings before the justice, including his judgment, and discharged the prisoner.

The writ of *habeas corpus*, as prayed for, is ordered to issue, "unless the counsel engaged are satisfied that no new phase of the case would be presented by the return, and are content to apply to the judge below for the relief they seek, as hereby indicated."—Ex parte *Burnett*, 30 Ala. 460 ; Ex parte *Croom & May*, 19 Ala. 561.

TOWNSEND *vs.* VAN ASPEN.

[FORCIBLE ENTRY AND DETAINER.]

1. *Sufficiency of complaint; averment of possession.*—An averment that the plaintiff was “lawfully and peaceably possessed of a leasehold interest or estate in the following premises,” is not a sufficient averment of actual possession.
2. *Same; averment of entry and detainer.*—An averment that the defendant “forcibly and unlawfully entered upon said premises, and now, although he has been notified in writing to quit said premises, still forcibly detains the same, and unlawfully refuses to quit,” though fuller than necessary, is substantially good.
3. *Same; description of premises.*—“The following premises, situated in the city of Mobile, and known and described as follows: all that certain piece, parcel, or lot of land, known as No. 268 of the Orange Grove tract, situated on the corner of Jackson and Lipscomb streets, in the city of Mobile,”—is a sufficient description of the premises in controversy.
4. *Recovery by plaintiff after expiration of lease.*—Since the question of title is not in issue in an action of forcible entry and detainer, (Code, § 2859,) the fact that the plaintiff’s lease, under which he was in possession at the time of the defendant’s entry, has expired before the trial, is no bar to a recovery by him.

APPEAL from the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THIS action was commenced in a justice’s court, on the 29th March, 1859. The cause of action endorsed on the summons was, “unlawful entry and detainer.” The complaint was in the following words: “The complaint of H. Van Aspen respectfully sheweth—1st, that on the 23d day of March, 1859, he was lawfully and peaceably possessed of a leasehold interest or estate in the following premises, situated in the city of Mobile, and known and described as follows: all that piece, parcel, or lot of land, known as No. 268 of the Orange Grove tract, situated on the corner of Jackson and Lipscomb streets in the city of Mobile; 2d, that on said 23d day of March, 1859, one F. Townsend forcibly and unlawfully entered in and upon

said premises, and now, although he has been notified in writing, for more than forty-eight hours, to quit said premises, still forcibly detains the same, and unlawfully refuses to quit. Wherefore, he prays that process may issue," &c. After the removal of the cause, by appeal, to the city court, the complaint was struck from the files, on the defendant's motion, on the ground that there was a variance between it and the endorsement of the cause of action on the summons; but the judgment of the city court was reversed by this court, at its June term, 1859, and the cause was remanded.—See the case reported in 36 Ala. 582.

After the remandment of the cause, the defendant demurred to the complaint, and assigned the following (with other) causes of demurrer: "1st, because it contains no sufficient description of the land, the possession of which is sought to be recovered; 2d, because it charges a forcible entry and a forcible detainer, when either, if alleged and proved, would have been sufficient, and both should not properly have been alleged in the same complaint, where it contains only one count; 3d, because it fails to aver that, at the time of the alleged forcible entry, the plaintiff was in the actual possession of the premises; 4th, because the estate or leasehold interest of the plaintiff is not set out in the complaint, so that the court may see whether the same has not heretofore expired and determined, and whether or not, on such expiration and determination, the defendant is not the reversioner of the estate." The court overruled the demurrer; the defendant then pleaded not guilty, and issue was joined on that plea.

On the trial, at the December term, 1860, the plaintiff's evidence showed that he was in possession of the premises in March, 1859, (at the time of the defendant's entry,) under a lease from one O'Donnell, which expired on the 1st November, 1859. The defendant thereupon requested the court to instruct the jury, "that, if the plaintiff's possessory interest in the premises expired on the 1st November, 1859, they must find for the defendant." The court refused to give this charge, and the defendant excepted.

The overruling of the demurrer to the complaint, and the refusal of the charge asked, are now assigned as error.

ALEX. MCKINSTRY, for appellant.

K. B. SEWALL, *contra*.

STONE, J.—When this case was before in this court, we said nothing about the sufficiency of the complaint: that subject was not then before us. The present complaint is demurred to; and one of the assigned grounds of demurrer is, that the complaint does not aver that the plaintiff, at the time of the grievances, was in the actual possession of the premises. The averment is, that “he was lawfully and peaceably possessed of a leasehold interest, or estate, in the following premises,” &c. Being “*possessed of an interest*” in the premises, does not, with reasonable certainty, imply that he was in the actual possession of the premises. If the pleader had owned a lease of the premises, and had sub-let to another, and put him in possession, or even if the lessee had never taken possession under his lease, he could say truthfully that he was “possessed of a leasehold interest.” To be possessed of a leasehold interest, is not the synonym of being in actual possession of the premises.—*Russell v. Desplous*, 29 Ala. 308, and authorities cited.

[2.] The allegation in the complaint, that the defendant “forcibly and unlawfully entered upon,” “and forcibly detains, and unlawfully refuses to quit the premises,” although perhaps fuller than necessary, is nevertheless good.—Code, §§ 2851, 2852.

[3.] We find no defect in the description of the premises, as the same appears in the complaint. From aught that we can know, the sheriff would find no difficulty in recognizing the premises by the description.—*Mead v. Daniel*, 2 Porter, 86; *Cunningham v. Green*, 3 Ala. 128; *Huffaker v. Boring*, 8 Ala. 90; *Snoddy v. Watt*, 9 Ala. 611.

[4.] There is nothing in the argument, that the plaintiff’s lease had expired before the trial in the city court. If the

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plaintiff was in possession, and the defendant forcibly entered upon him, the plaintiff's right was complete ; and the question of title was not one of the issues in the cause. Code, § 2859.

For the error above pointed out, the judgment of the city court is reversed, and the cause remanded.

PHILLIPI vs. CAPELL.

[MOTION FOR EXECUTION ON FORTHCOMING BOND.]

1. *Forthcoming bond ; death of slave discharges condition.*—The condition of a forthcoming bond is discharged by the death of the slave before forfeiture, and no liability results to the surety from the failure to deliver him according to the stipulations of the bond.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE appellees in this case, Wesley N. Capell and Harvey S. Capell, filed their bill against John Nugent, Giobe Landano, and others, to enforce a settlement of said Nugent's accounts as their guardian, and to subject to the satisfaction of whatever decree might be rendered in their favor certain slaves and other property, which Nugent had mortgaged to the sureties on his official bond as guardian, and which Landano claimed by subsequent purchase from him. An attachment was sued out in the case, to prevent Landano from removing two of the slaves, Ralph and Matt, which were in his possession ; and he thereupon gave a forthcoming bond, for their delivery, with A. Phillipi as his surety. The bond was dated the 25th of January, 1854, and was conditioned that the said Landano and Phillipi "shall have forthcoming, and deliver to the proper officer the above described property, within thirty days after judgment, to satisfy such recovery as may be had, or such judg-

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ment as may be rendered, in favor of the plaintiffs in said attachment, by the court trying the same." A receiver was afterwards appointed in the cause, and the slave Ralph was delivered up to him. At the June term, 1859, Hon. WADE KEYES presiding, the complainants obtained a decree, and a sale of the mortgaged property, including the slave Ralph, was ordered; and a money decree was also rendered against Landano, for one thousand dollars, the value (as reported by the master) of the slave Matt, who had died in his possession before the rendition of the decree.

In July, 1860, the complainants filed their petition, alleging the insufficiency of the proceeds of sale of the mortgaged property to satisfy their decree, and the insolvency of both Nugent and Landano; and asking an award of execution against Phillipi, as the surety on the forthcoming bond, for the sum reported by the master as the value of the slave Matt. Phillipi demurred to the petition, and also insisted, by answer, that the death of the slave before the rendition of the decree discharged the bond. The chancellor overruled his demurrer, and awarded execution against him; and he now assigns the chancellor's decree as error.

DARGAN & TAYLOR, for appellant.

GEO. N. STEWART, *contra*.

A. J. WALKER, C. J.—Before forfeiture of the forthcoming bond, the slave Matt died; and no liability upon the bond could result from the failure to deliver him in pursuance of the stipulations of the bond.—*Falls v. Weissinger*, 11 Ala. 801.

The decree of the court below must be reversed, and a decree must be here rendered, dismissing complainants' petition; and the appellees (who were the petitioners below) must pay the costs of the chancery court, and of this court.

LONGMIRE vs. GOODE & ULRICK.

[CREDITORS' BILL TO ESTABLISH AND ENFORCE GENERAL ASSIGNMENT.]

1. *What is general assignment.*—A deed, by which a debtor conveys to a trustee, for the benefit of certain specified creditors, substantially all the property which he holds subject to legal process in this State, is a general assignment, (Code, § 1556,) and enures to the benefit of all his creditors equally.
2. *Weight of answer as evidence.*—Where a creditors' bill seeks to have a deed of trust, executed by a debtor for the security of a portion of his creditors, declared a general assignment; an answer by the preferred creditors, which denies that the deed is a general assignment, or that it conveys all the grantor's property, but which is silent as to any other property then owned by him, is entitled to but little weight as evidence.

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. M. J. SAFFOLD.

THE bill in this case was filed by the appellees, as creditors of William M. Longmire, on behalf of all the creditors who might come in and contribute to the expenses of the suit, against said W. M. Longmire, J. J. Longmire, Garrett Longmire, and Stanford Mims. Its object was to have a deed of trust, by which said Wm. M. Longmire conveyed certain real and personal property to J. J. Longmire, as trustee, for the security and indemnity of Garrett Longmire and Mims against liability as sureties for Wm. M. Longmire on a guardian's bond, declared a general assignment, and held to enure to the equal benefit of all the creditors; and it also prayed that said trustee might be required to give bond for the execution of the trust under the directions of the court, or that a receiver might be appointed to take possession of the property. A decree *pro confesso*, on publication, was entered against Wm. M. Longmire. Separate answers were filed by the other defendants; each denying that the deed was a general assignment, or that it conveyed all the grantor's property. On final

hearing, on pleadings and proof, the chancellor rendered a decree for the complainants; and his decree is now assigned as error.

S. J. CUMMING, with whom was E. S. DARGAN, for appellants, cited Burrill on Assignments, (2d ed.) 126-30; *Davis v. Anderson*, 1 Kelly, 176; *Lee v. Brown*, 7 Georgia, 275; *Lavender v. Thomas*, 18 *ib.* 668; *Meredith Manufacturing Company v. Smith*, 8 N. H. 347; *Henshaw v. Sumner*, 23 Pick. 446; *Bloom v. Noggle*, 4 Ohio St. R. 45; *Harkdrader v. Leiby*, *ib.* 602.

ANDERSON & BOYLES, and TORREY & LESLIE, *contra*, cited *Holt & Chambers v. Bancroft*, 30 Ala. 193; *Warren v. Lee & Larkins*, 32 Ala. 440; *Downing v. Kintzing*, 2 Serg. & R. 326; *Noyes v. Hickok*, 27 Vermont, 36; *Massey v. Noyes*, 26 *ib.* 462; *Bishop v. Hart's Trustees*, 28 *ib.* 71.

STONE, J.—The deed of conveyance from Wm. M. Longmire to John J. Longmire, dated November 18th, 1857, is a general assignment under section 1556 of the Code, if the grantor thereby conveyed substantially all the property which he held, subject to legal process from the courts of Alabama. This principle is too well settled to require more than a citation of our own decisions.—*Holt v. Bancroft*, 30 Ala. 193; *Price v. Mazange*, 31 Ala. 701; *Warren v. Lee*, 32 Ala. 440. This case, then, resolves itself into a question of fact.

[2.] The answers of the defendants, while they persistently deny that the deed is a general assignment, or that it conveys all the property which the said Wm. M. Longmire then owned in the State of Alabama, are as steadfastly silent as to any other property which he did own. This omission justifies us in giving but little weight to these chary denials.—*Grady v. Robinson*, 28 Ala. 289.

An attempt is made in the proof to show that Wm. M. Longmire owned the negro woman Sarah, and her boy Nelson. This, we think, is an utter failure. As against any claim which Wm. M. Longmire could assert, she and

her child were certainly the property of Dennis on the 18th day of November, 1857; and they were probably out of this State at that time. We think the buggy and two horses were also out of the State. The cattle, the corn, and the gun, were exempt from levy and sale for the use of the family.

This disposes of all the property left out of the deed, except the old slave Ned, the remnant of merchandise, and the sulky. Ned was utterly valueless. The merchandise, some two or three hundred dollars worth, we think had been disposed of to other parties; and the sulky was of but inconsiderable value. We hold, that the deed conveyed substantially all the property owned by Wm. M. Longmire which, at the time, was subject to process issuing from the courts of Alabama; and that it is a general assignment.

We have thus disposed of the only assignment of error found in the record; and the result is, that the decree of the chancellor must be affirmed.

CRUTCHER vs. MEMPHIS & CHARLESTON RAILROAD COMPANY.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Contract of agent, in his own name, not prima facie binding on principal.*
A writing in these words: "Hired of R. C. the following negroes, to-wit." &c., "to work on the M. & C. railroad, from now until the 25th December next; for which I agree to pay said C. twenty-five dollars per month each, and I also agree to feed, and pay all medical expenses, if any; and the said C. loses all runaway time, if any. Given under my hand and seal"; and signed, "W. H. E., agent for M. & C. R. R. Co., per W. M. N."—is, *prima facie*, the contract of the agent, and not binding on the principal personally.
2. *Offer of deposition containing both legal and illegal evidence.*—When an entire deposition is offered in evidence, the court is not bound to separate the legal from the illegal evidence which it contains, but may exclude it altogether.

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3. *General charge on evidence ; presumption of injury from error*—Where there is an entire failure on the part of the plaintiff to prove a fact necessary to his recovery, the court may instruct the jury, without hypothesis, to find a verdict for the defendant ; but, if the court, having instructed them hypothetically—“if they believe the evidence”—to find for the defendant, afterwards repeats this charge to them, “accompanying it with the intimation, that their further deliberations must result in a verdict for the defendant, else they would subject themselves to the consequences of a contempt of court,”—this is an error, from which injury will be presumed, and which will work a reversal, unless the bill of exceptions affirmatively shows that the court might properly have directed the jury, in the first instance, to find a verdict for the defendant, without referring to them the credibility of the testimony.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. S. D. HALE.

THIS action was brought by Reuben Crutcher, against the Memphis & Charleston Railroad Company, to recover damages for the loss of a slave, who was accidentally killed while working on the defendant's road ; and was commenced on the 23d July, 1857. The complaint, as amended, contained a count in trover, and also a special count, which averred that the slave, while in the defendant's possession under a contract of hiring, was employed in work which was extraordinarily dangerous and hazardous, contrary to the stipulations of the contract, and, while so employed, was negligently killed. On the trial, as the bill of exceptions shows, the plaintiff proved the circumstances attending the slave's death, and his value ; and then introduced one Studdart as a witness, who testified as follows :

“ Witness was authorized by F. C. Arms, the defendant's general superintendent and chief engineer, to hire hands for the defendant's road. Defendant was anxious that the road should be speedily completed, and offered extraordinary inducements to its agents to hire hands. Witness' contract of agency authorized him to hire hands for the use of the road at any price less than thirty dollars per month, the road being responsible to the master for such sum as he agreed to pay ; and in addition, as compensation for his

services in hiring hands, the defendant allowed him the difference between the prices so agreed on and thirty dollars per month. Witness originally had the contract on section No. 42 of the defendant's road ; but, before completing that, defendant was anxious for him to contract also for section No. 39 ; and witness finally agreed to do so, with one D. H. Stevens, under the firm of Studdart & Stevens. At the time of his said contract for section No. 39, witness was agent to hire hands for defendant, under the power before mentioned ; and he agreed with one W. M. Newby, that if he (Newby) would furnish seven or eight hands on said contract, in addition to their hire he should be allowed fifty dollars per month for his personal attention under said contract. Said Newby did furnish seven or eight hands, and among them were the two negroes belonging to the plaintiff. After the completion of his contracts, and after the death of the negro John, witness remained on the road until the 25th December, 1856, when he had a settlement with the defendant. In that settlement, witness charged the company with the hire of all the hands who had been working on his contracts, whom he transferred to the general use of the road, at the rate of thirty dollars per month ; and his account was allowed. Among the hands so transferred was Clem, the plaintiff's remaining slave ; and witness received from defendant, for the remainder of the year, thirty dollars per month for said hands." The witness further testified as to the manner in which blasting was done on the road, and the hazard and danger attending it.

The plaintiff then read in evidence the deposition of F. C. Arms, who testified, that he was the defendant's chief engineer and general superintendent, from March 1, 1856, to July 1, 1858, and had the same powers and duties which usually appertain to those officers, under the direction of the president and board of directors ; "that he had general authority to employ sub-agents, contractors, negroes, &c., but a general rule of the company required all important contracts to be in writing, and signed by the president ;" "that he gave W. H. Easley written authority to employ

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negroes to work on the defendant's road, and was authorized to do so by virtue of his office, but has no written evidence of his authority ;" "that the negroes employed by said Easley, among which were the plaintiff's negroes, were put to work on a private contract near Corinth, and the company was not notified of the hiring until after the death of one of said negroes ;" and "that plaintiff's said negro was not received into the employment of the company, they having no notice that the negro was hired for them."

The plaintiff then read in evidence the written authority given by said Arms to Easley, which was dated August 15, 1856, signed "F. C. Arms, eng. and general superintendent," and stated that "the bearer, W. H. Easley, is authorized to employ negroes to work on the Memphis & Charleston railroad, and any contract made by him for this purpose will be duly ratified by the said company ;" and he then offered to read to the jury a writing of which the following is a copy :

"Huntsville, Ala., Sept. 6, 1856. Hired of R. Crutcher the following negroes, to-wit, John and Clem, to work on the M. & C. railroad from now until the 25th December next ; for which I agree to pay said Crutcher twenty-five dollars per month each, and I also agree to feed, and pay all medical expenses, if any ; and the said Crutcher loses all runaway time, if any. Given under my hand and seal.

"W. H. EASLEY, agent
for M. & C. R. R. Co., per W. M. Newby."

The defendant objected to the reading of this paper as evidence, and the court sustained the objection ; to which the plaintiff excepted. The plaintiff then offered in evidence the deposition of said Newby, who made the contract for the hiring of plaintiff's negroes, and who appended to his deposition, as an exhibit, the written authority from said Easley under which he acted. The court excluded the deposition and exhibit, on the defendant's motion, and the plaintiff excepted.

"The plaintiff asked the court to instruct the jury, that

if they believed the negro John was placed by defendant's agent or superintendent, in discharge of the work, during which—(?) then they must find a verdict for the plaintiff, for the value of the negro, with interest. The court refused this charge, and the plaintiff excepted to its refusal. The court charged the jury, at the request of the defendant, that if they believed the evidence they must find a verdict for the defendant; to which charge the plaintiff excepted. The court gave no other charge to the jury, and they retired to consider of their verdict. After the lapse of a short time, the jury returned for further instructions from the court, which the court gave. The jury retired to consider further of their verdict; but, before they returned, the court instructed the sheriff to bring them into the courtroom, and the sheriff did so; and the court thereupon repeated to them the charge which it had first given, accompanying it with the intimation, that their further deliberations must result in a verdict for the defendant, else they would subject themselves to the consequences of a contempt of court. To the order of the court to the sheriff to bring the jury into court, to the charge of the court, and to the accompanying remarks, the plaintiff excepted."

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

WALKER & BRICKELL, *contra*.

A. J. WALKER, C. J. [1.]—The contract of hiring in this case was not, *prima facie*, the contract of the defendant, but of him by whom it was executed. The word "agent," following the signature to the contract, does not constitute it the contract of an agent for his principal.—*Drake v. Flewellen*, 33 Ala. 106. The contract was, therefore, *prima facie*, inadmissible; and, in the absence of the introduction or offer of explanatory evidence, was properly excluded.

[2.] There was no error in rejecting the offer in evidence of the deposition of Newby, with its exhibit; for at

least a portion of it was illegal, and the court was authorized to exclude the legal and illegal evidence offered together.—*Hiscox v. Hendree*, 27 Ala. 216 ; *Jeans v. Lawler*, 33 Ala. 340.

[3.] The bill of exceptions does not purport to set out all the evidence. We therefore do not know that all the evidence in the case is before us, and cannot affirm that the court erred in its charge upon the effect of the evidence if believed. If we knew that the bill of exceptions contained all the evidence, we should decide that the charge was correct ; for, upon that evidence, the defendant is not chargeable on account of the death of the slave. The mere fact that the slave was employed in the construction of the defendant's road, could not render it liable. The court, therefore, committed no error in refusing the charge asked.

The bill of exceptions informs us, that after the retirement of the jury, they were re-called by order of the court ; and that thereupon the court "repeated the charge to the jury it had first given, accompanying the charge with the intimation, that their further deliberations must result in a verdict for the defendant, else they would subject themselves to the consequences of a contempt of court." The charge which the court first gave was, that if the jury believed the evidence, they must find for the defendant. This was, therefore, the charge which was repeated to the jury, in connection with the menace of punishment, unless a verdict was found for the defendant. The court instructs the jury that, if they believe the evidence, they must find for the defendant, and accompanies the instruction with an intimation, that they will incur the penalties of contempt, if *their deliberations* did not result in a verdict for the defendant. The credibility of the testimony is referred to the jury for their determination, and they were caused to retire for further deliberation. If there was a question for the jury to determine, their deliberations should have been left free and uncontrolled. That there was such a question, is clearly implied from the charge given ; and in assuming to control the decision of that question, the court erred. The

charge is upon its face erroneous, in that it refers a question to the jury, and then assumes to control its decision.

It may be, that the plaintiff sustained no injury from this error ; and we would probably so hold, if we knew that the bill of exceptions contained all the evidence. The bill of exceptions discloses no evidence whatever, showing, or tending to show, a responsibility of the defendant on account of the slave's death. So far as it is concerned, there is entire absence of any evidence of the defendant's liability. Therefore, if the whole testimony is set out in the bill of exceptions, there was a want of any evidence upon which to charge the defendant, and the court was authorized to direct the jury to bring in a verdict for the defendant. Such a direction is proper, where there is a plain and indisputable failure of the plaintiff to make out his case in some essential particular.—*Gillespie v. Battle*, 15 Ala. 276-285 ; *Knox v. Fair*, 17 Ala. 503 ; *Swift v. Fitzhugh*, 9 Porter, 39 ; *Madden v. Blythe*, 7 Porter, 258 ; *Henderson v. Mabry*, 13 Ala. 713 ; *Rhodes v. Otis*, 33 Ala. 578 ; *Rigby v. Norwood*, 34 Ala. 129 ; *Shepherd's Digest*, 459. In doing so, the court does not pass upon the credibility of testimony, nor upon any conflict of evidence. It does not even announce the existence of evidence. It simply declares the want of evidence, and the effect of its absence.

We conjecture that, in reality, the bill of exceptions does contain all the evidence in this case, and that the instruction of the court was really given in a case where it was permissible to direct the jury to return a particular verdict ; and we suppose, that the question of the credibility of the testimony was referred to the jury, in a phrase of such frequent occurrence as to become almost habitual with circuit judges ; and that, in the hurry of the trial, the inconsistency of a reference of such a question with the assumption of a right to direct the verdict, escaped attention. We are, however, bound to render our judgment upon the case as the record makes it ; and upon the record it is our plain duty to reverse the judgment of the circuit court.

Shannon v. Reese.

An error was committed ; we do not know, from the bill of exceptions, that the entire evidence is before us ; we are, therefore, not authorized to say that no injury resulted from the error committed ; and, upon a principle repeatedly announced by us, there must be a reversal.

Reversed and remanded.

SHANNON vs. REESE.

[BILL IN EQUITY FOR INJUNCTION OF JUDGMENT AT LAW.]

1. *Equitable relief against judgment at law, on ground of fraud or surprise.*—In an action on an open account, due to the plaintiff from the defendant's intestate, a verdict and judgment having been rendered against the plaintiff, for the amount due on a promissory note, which was offered in evidence under the pleas of payment and set-off, he cannot enjoin the judgment in equity, by showing that the note was given for the price of property bought by him from the defendant as administrator ; that the defendant objected to allowing the price of the property to be credited on the plaintiff's account against the intestate, because he insisted that the account was too large, and ought to be settled by a lawsuit, and said that, if plaintiff would give his note for the amount, he would use it as a set-off, *pro tanto*, against the account ; that in a subsequent conversation, between the plaintiff's attorney and the defendant, pending the action, the defendant repeated this objection to the account, but urged no other objection to it ; that on the trial his counsel insisted before the court and jury, in his presence, that the note, being of later date, was *prima-facie* evidence that the account had been settled, and that the court so instructed the jury.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon JAMES B. CLARK.

THE bill in this case was filed by John H. Shannon, against Andrew J. Reese, as the administrator of Freeman B. King, deceased, for the purpose of enjoining a judgment at law, which said administrator had recovered against said Shannon. The action at law, in which said judgment was rendered, was brought by Shannon against Reese, as the

administrator of King; and was founded on an open account, alleged to be due and owing from the intestate to the plaintiff, in December, 1856, for work and labor done, and for the hire of two slaves, amounting to the aggregate sum of \$1120. The defendant pleaded, in short by consent, *non assumpsit*, payment, and set-off; and issue was joined on these pleas. On the trial, the defendant offered in evidence, under the pleas of payment and set-off, a promissory note for \$554 71, executed by the plaintiff, dated the 9th February, 1857, and payable one day after date, to the defendant, as the administrator of said King; and his counsel insisted, before the court and jury, that the note, being of later date than the account, was *prima-facie* evidence that the account was settled when the note was given. The court sustained this position, and instructed the jury accordingly; and the jury having thereupon returned a verdict for the defendant, for the amount of the note and interest, judgment was rendered against the plaintiff on the verdict.

The bill alleged, as grounds of relief against this judgment, that the account was not settled when the note was given; that the note was given in part payment of the purchase-money of two slaves, bought by the plaintiff from the defendant as such administrator; that the balance of the purchase-money was paid by the surrender of two promissory notes held by the plaintiff against the intestate; that the plaintiff desired and proposed, at the time of the purchase, instead of giving his note for the excess of the purchase-money above the amount due on these notes, to enter that sum as a credit on his account against the intestate; that the defendant objected to doing this, "because he thought said account was too large, and ought to be settled by law, and said that King's estate might prove insolvent, and that the note should be taken in part payment of whatever judgment might be obtained by plaintiff upon said account;" that afterwards, pending the action on the account, defendant told John A. Lodor, one of plaintiff's counsel, "that said account was too large—that plain-

tiff had charged said intestate, in that account and another, with more days' work than there were working days in the year, and had also improperly charged him with the hire of a negro girl;" that defendant did not, either then or at any other time, "raise any other objection to said account, or say or pretend that it had been settled by him;" "that this course of conduct on the part of the defendant induced plaintiff and his counsel, very reasonably, to suppose that, on the trial of said action, there would be no other controversy than in reference to the justness of said account;" "that plaintiff being always willing to allow said note as a set-off, and defendant being notified of that fact by plaintiff's counsel, induced plaintiff and his counsel not to summon as a witness Dr. E. M. Vasser, who could have proved the consideration of said note;" that plaintiff and his counsel, "knowing the existence of the foregoing facts, were surprised and astonished when, on the trial, the defendant took the position, that said note was *prima-facie* evidence of a settlement of all accounts;" that this conduct on the part of the defendant was fraudulent and unconscionable; that the defendant was personally present at the trial, and heard the verdict of the jury rendered in his favor, and made no effort to correct it; and that afterwards, on the evening of the same day, he confessed to S. M. Hill his surprise at the verdict, and said that he only expected that the note would be allowed as a set-off against the account.

The defendant demurred to the bill, for want of equity, and filed an answer, the material part of which is embraced in the following extract: "Respondent admits, that said note was given for the amount which the price of said negroes, bought by plaintiff from respondent, exceeded the amount due on the two notes held by plaintiff against said intestate; also, that plaintiff's said account, on which said action was founded, was not included in said settlement had in February, 1857, and that it has never been paid. He admits, also, that he refused to credit said account with the amount for which said note was given, and that he probably gave as his reasons for doing so, 'that he thought

the account too large, and should be settled by a lawsuit, and that he would use the note as a set-off in the action; but he denies that he ever agreed that the note should be taken or used as a part payment of the judgment which the plaintiff might recover on the account. Respondent did have a conversation with John A. Lodor, but cannot now recollect its precise terms; it may have been as stated in the bill. But respondent denies that he ever admitted the correctness of said account, either directly or by implication, to said Lodor or the plaintiff, or agreed to pay it, or to waive any defense to it; and he expressly denies that he ever said or did any thing with the intention of misleading the plaintiff or his counsel, or putting them off their guard, or with a view to get any advantage over them or either of them. He did not then, and does not now, know the correctness of said account; but firmly believed then, as he does now, that a great part of it is unjust, and not really due; and that on a strict accounting between plaintiff and the estate of said King, for services actually rendered, the amount due from plaintiff to said estate would be much larger than the amount of said note. Having this belief, when said suit was brought against him, this respondent considered it his duty as administrator to defend it; and he employed counsel for that purpose, and told them what he knew and believed about said account, and instructed them to make the best defense they could under all the circumstances; but respondent never instructed them to take the position, that the note was *prima-facie* evidence of a settlement or payment of the account, and it never occurred to him that that position could be taken, until he heard his counsel make the point on the trial. Respondent was present when the verdict was rendered in his favor, and was surprised at his gaining the case,—not because he believed that the plaintiff was entitled to a verdict, but because this respondent was unable to show the true state of accounts between the parties; and it is probable that he expressed his agreeable surprise to Col. S. M. Hill, or some other friend, though he does not recollect the pre-

cise language used. And this respondent utterly denies that he has ever done any act, or uttered any word, fraudulently, or with the intent to mislead, surprise, or astonish the plaintiff or his counsel."

The complainant took the depositions of Jno. A. Lodor, and S. M. Hill. The latter testified to an admission by the defendant, made some time after the commencement of the plaintiff's suit against him on the account, (but he could not recollect whether it was before or after the trial of the cause,) to the effect "that he considered a part of the claim just, and a part unjust; that he was willing to pay all he thought was right and proper, but, as suit had been brought against him, plaintiff would have to do the best he could; or something to that effect." Lodor testified as follows: "I had a conversation with the defendant, in reference to the plaintiff's account against the estate of F. B. King, on or about the 22d May, 1858. Said account was then in the hands of Gayle & Lodor for collection, and suit had been brought on it against the defendant, as the administrator of said King. In that conversation, I alluded to a letter which I had then recently written to him on the subject, but to which he had not replied; and I mentioned to him that I had been instructed by the plaintiff to receive in part payment of said account, a note for five or six hundred dollars, which plaintiff had previously given to him as administrator. The defendant refused to make the settlement, alleging, as a reason therefor, that plaintiff had charged in his account for more time than he could have been employed for said King; that by comparing said account against said F. B. King' estate with another account which plaintiff had against the estate of one Benjamin King, it appeared that he had charged for more working days than there were in the year; also, that plaintiff's account was wrong in another respect, because it contained an item for the hire of a negro named Louisa, when said King had a sufficient number of house servants, and did not hire said girl, though she was allowed to stay at his house. These were the only objections made by the

defendant to said account. Being desirous to effect a settlement of the matter, I proposed to him to correct any errors that might exist in said account, and stated that, if he and plaintiff would meet and converse in reference to it, plaintiff might be able to satisfy him that it was correct; and I proposed that such a meeting should take place. Defendant readily assented to the proposal, and a day was appointed; but he failed to appear at the time. I saw him afterwards, and he made some excuse for failing to be present at the appointed time; and he spoke as though he would be hard to satisfy as to the correctness of the plaintiff's account in the items objected to. From the tenor of his whole conversation, the impression was created on my mind, that these objections were the only obstacles to a settlement of the account; and that, if they could be removed, or explained satisfactorily to him, a settlement could be effected. The first conversation, above alluded to, was had after the suit had been brought on the account; the account was shown to the defendant, and was examined by him; and no other objection was made to it than those above mentioned. From the said conversations and interviews I had with the defendant, the impression was created, that the said objections urged by him were the only reasons that prevented a settlement, and the only points on which he desired to be better satisfied; and I was surprised when, on the trial of the cause, it was contended by his counsel that the note, being dated subsequent to the maturity of said account, was evidence of a settlement of all accounts between the parties, and was for a balance found due on such settlement. This view of the case was never presented or suggested in any of the conversations between the defendant and myself. At the same time, I knew that an appearance had been entered for the defendant, and that the case would be litigated; and I expected that his counsel would use, as every lawyer does, all proper means to gain the cause; but I did not expect that any such use would be made of the note, and was misled by believing, from said conversation with the defendant, that the defense

would be limited to the objections urged by him; and hence, in the preparation of the cause for trial, and on the trial, plaintiff's counsel confined their efforts to an establishment of the correctness of the account."

The chancellor overruled the demurrer to the bill, and refused to dissolve the injunction on the answer; but, on the final hearing, on pleadings and proof, he intimated that his former opinion was wrong, and dismissed the bill; and his decree is here assigned as error.

GEO. W. GAYLE, and D. W. BAINE, for appellant.

STONE, J.—We can not perceive, in this record, the slightest evidence that Mr. Reese perpetrated any fraud against the rights of Mr. Shannon. The conversation which he held with Mr. Shannon's attorney, seems to have been at the attorney's instance; and in that conversation, he seems to have given, fairly and honestly, the reasons which, as we can very readily suppose, influenced him in refusing to pay Mr. Shannon's demand, until its justice should be established. It does not appear that Mr. Reese asserted any falsehood, or that he even suppressed any material fact of which he had knowledge. True, he did not inform the attorney of the legal presumption which was afterwards successfully invoked for him on the trial; but it does not appear that he knew of such legal principle, nor, indeed, that he had employed an attorney, at the time he held the conversation. He did no more than urge objections to the account, which he probably believed were well taken.

On the other hand, the plaintiff, Shannon, knew that he executed the note to Reese; and before he entered upon the trial, he probably knew that note would be used in defense; for the plea of set-off was interposed.

The question made by the record is simply this: A defendant administrator is sued on a claim, which he declares to be unjust. On the trial, his counsel avails himself of a legal presumption, and thereby defeats the plaintiff's recovery; the plaintiff, if he had anticipated the use to be

made of *this known fact*, having it in his power to procure and produce other evidence which would repel the legal presumption. He foregoes his right to take a voluntary nonsuit, but suffers a verdict and judgment to go against him ; and fails to move for a new trial on the ground of the surprise he complains of. These facts do not amount to an impeachment of the justice of the judgment, "on grounds of which the defendant could not have availed himself" [in the court of law,] "or was prevented from doing so by fraud, or accident, or the act of the opposite party, unmixed with negligence or fault on his part."—*French v. Garner*, 7 Por. 553 ; *Allman v. Owen*, 31 Ala. 167 ; *Moore v. Lesueur*, 33 Ala. 243 ; *Thomas v. Tappan*, 1 Free. Ch. 472. Decree affirmed.

WRIGHT & RICE vs. MOORE ET AL.

[BILL IN EQUITY TO RESTRAIN DIVERSION OF WATER FROM MILL.]

1. *Prescriptive easement in use of water ; statute of limitations applied by analogy in equity.*—By analogy to the statute of limitations applicable to actions at law for the recovery of land, (Clay's Digest, 329, § 92 ; Code, § 2476,) the adverse enjoyment, for ten years, of the privilege of damming up the water of a stream so as to raise the level without overflowing the banks, creates the presumption of a right, which a court of equity will protect ; but, to bring himself within this principle, the plaintiff must show an adverse user, for the prescribed period, to the extent claimed by him in his bill.
2. *Same.*—An averment in the bill, that the plaintiff has used the water, for the prescribed period, "in the same way," is not sufficient, when the bill also alleges that his new dam, which had stood less than ten years, is higher than the former dams were, and does not allege that the former dams raised the level of the water on the defendant's land ; nor can it be inferred that the former dams caused any refluxence on the defendant's land, because it is alleged that the new dam only raises the level of the water a few inches ; nor, if that inference could be drawn, would it authorize the increased refluxence caused by the new dam, since an easement, acquired by prescription, is restricted to the extent of the user.

3. *No prescription for nuisance.*—There can be no prescription for a public nuisance, and no length of enjoyment can legalize the continuance of a mill-pond which is injurious to the health of the surrounding community.
4. *Abatement of private nuisance.*—A riparian proprietor, upon whose lands the water is thrown back, or its level raised without overflowing the banks of the stream, by a dam erected below him, has a right to abate the nuisance; and the proper mode of abating it is, by lowering the level of the dam, if there be a prescriptive right for it, to the height authorized by such prescription, or, in the absence of any prescription, to such a height as will stop the reflux of the water at his boundary line; but he has no right to divert the water from the stream, to the injury of the proprietor below him, by cutting a ditch on his own land.
5. *When equity will restrain diversion of water.*—Where plaintiff owns valuable and extensive machinery, which gives employment to a large number of hands, and which is worked by the water-power of a stream, a court of equity will restrain by injunction a repeated diversion of the water, and a threatened continuance of such diversion, by the upper proprietors, by means of a ditch on their own lands; and this, on the principle of preventing irreparable mischief and a multiplicity of suits.

APPEAL from the Chancery Court of Lauderdale.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by the appellants, as partners, on the 17th May, 1858, against Lewis C. Moore, Atlantic P. Moore, his wife, and Hugh M. and John Moore, his sons; and sought to restrain the defendants from diverting the water from a stream, called "Coxe's creek," on which the plaintiffs had erected an extensive machine-shop, foundry, and grist-mill. The material facts of the case, as alleged in the bill, appear in the opinion of the court. The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

JNO. S. & E. W. KENNEDY, with whom were GOLDTHWAITE, RICE & SEMPLE, for the appellants.

JAMES IRVINE, *contra*.

A. J. WALKER, C. J.—The chancellor's decree, dismissing the complainants' bill for want of equity, is the

only matter for examination in this court. No question as to the sufficiency, responsiveness, and effect of the answer, or as to the truth of the bill, is before us. We are simply to inquire, whether the allegations of the bill make a case for equitable jurisdiction. If they do, the decree is erroneous ; if they do not, it is correct. We are, on this appeal, to regard the allegations as truths ; and will, therefore, in this opinion so speak of them.

The complainants have a dam upon a certain stream, directing to their machinery the water which constitutes its propelling power. This dam backs up the water on the land of some of the defendants, but does not cause it to overflow the banks of the stream. A dam, about fifty feet below the present one, was erected by a former proprietor, more than twenty years before the complainants were disturbed in the use of the water. At a time intermediate between the erection of the latter and the former, another dam was built. The present dam was erected less than ten years before the commencement of this suit ; and it is higher by less than six inches than the previous ones. Whether the first two dams, or either of them, backed up the water on the defendants' land, is not disclosed by the bill. It does not, therefore, affirmatively appear that the natural flow of the stream upon the defendants' land was interrupted, until the last dam was built. We can not infer, because the last dam extends the reflux on the defendants' land, that therefore the former dams, of less height, and different position, had the same effect. Indeed, we are without the data for an argument upon the subject ; for the bill is silent as to the degree of fall in the stream, and as to the extent to which the water is thrown back upon the defendants' land. We only make out that the present reflux reaches the defendants' premises, from the statement that a ditch upon their land extends into the pond. *The disclosure of the bill is, that there has been, by aid of three successive dams, a continuous use of the stream for propelling machinery ; and that this use has, since the erection of the last dam, and for a period less than ten years,*

disturbed the accustomed flow of the stream upon the defendants' land.

[1.] Since the 7th February, 1843, ten years has been the period of limitation to actions for the recovery of land. Clay's Digest, 329, § 92; Code, § 2476. By analogy to this statute, the adverse enjoyment, since its adoption, for the prescribed length of time, of the privilege of throwing the water of the stream back upon the defendants' land, would create the presumption of a right to such enjoyment, which a court of chancery would protect.—*Stein v. Burden*, 24 Ala. 130; 3 Kent's Com. 443; *Wright v. Howard*, 1 Sim. & Stu. 190–203. It is sufficient to authorize the presumption, that the complainants, and those through whom their title has come down to them, have together had the continuous enjoyment for the prescribed period. It is a legal right of every riparian proprietor, to have the stream flow through his land in its natural channel, without obstruction, or interruption, or even an alteration of its level.—Angell on Water-Courses, §§ 95, 340; *Wright v. Howard*, *supra*; *Stein v. Burden*, 29 Ala. 127; *Hendricks v. Johnson*, 6 Porter, 472. The throwing back of the water of a stream upon another's land, so as to impede its current and raise its level, would be an actionable infringement of his right, notwithstanding the water might still be confined within the banks. The privilege of so throwing the water back without overflowing the banks, is an easement,—a right which could as well be acquired by ten years' enjoyment, as a right to inundate the land of a super-riparian proprietor. Therefore, the adverse enjoyment for ten years, of the privilege of extending a refluxence, confined within the banks of the stream, on to the defendants' land, would create the presumption of a right.

It is clear that the complainants do not, by the allegations which we have heretofore noticed, bring themselves within the principle above stated; for it is not shown that any enjoyment, challenging and adverse to the right of defendants, or those under whom they hold, was exercised until the last dam was erected, within the period of ten years.

[2.] This defect in the allegations is not remedied by any thing found in the bill. It does assert, that the complainants, and those under whom they claim, have had the exclusive adverse enjoyment of the water of the creek, "*in the same way*," for more than twenty years. This assertion can be reconciled with the allegation that the present is higher than the former dams, and in a different location, only by understanding it to refer to the uses to which the water is appropriated, and not to the agency by which it is made available. We therefore regard it as a statement that the water had been enjoyed by them and their predecessors for more than twenty years in propelling machinery, and not that during all that time the same elevation had been given to the water, and the same reflux produced.

It seems that the elevation of the water in the canal caused by the present dam, is only three inches greater than that caused by the previous dams; and it is, perhaps, a reasonable inference, that the increased reflux above the dam can not be much greater. It is argued, that this increase of elevation is so small as to be immaterial, and that the present elevation must be justified by a long continued previous enjoyment of one so slightly smaller. This argument can not be sound. It is not shown that the previous dams caused any reflux upon the defendants' land. It is impossible that an enjoyment, which did not disturb any right, could become the predicate of a prescriptive right to throw back the water upon the defendants' land.

But, even if the bill had shown that the two first dams backed up the stream upon the defendants' premises, and that the easement had been enjoyed for more than ten years, it would not follow that a right to increase the extent of the reflux, even by so small an additional elevation as three inches, would be acquired. The law does not make it indispensable to the establishment of a prescriptive right, that the mode or manner of using the water should have been precisely the same through the period of prescription. On the contrary, variations in the use, not materially prejudicial to other owners, do not interfere with

the prescription.—3 Kent's Com. 443. But this doctrine has no relation to the question, whether an adverse enjoyment can be increased in its extent, beyond the limits of the use which gives the right by prescription. A right conferred by deed, would be limited by the terms of the grant.—Angell on Waters, 148–149. Certainly, the argument is as strong for a like limitation of the extent of the right acquired by prescription; and we accordingly find that the authorities carefully restrict the easement acquired by prescription to the extent of the user.—Angell on Waters, §§ 224, 225, 226; *Style v. Hooker*, 7 Cow. 266; *Baldwin v. Calkins*, 10 Wend. 167; *Darlington v. Painter*, 6 Barr, 473; *Stein v. Burden*, 24 Ala. 130. If the dams which existed ten years before the disturbance alleged in the complainants' bill, produced a reflux upon the defendants' land, then there might be a prescriptive right to that extent; but an increase of the reflux, by an additional elevation, within ten years, would be an unauthorized invasion of another's right.

[3.] In dismissing the subject, we deem it proper to remark, that there can be no prescription for a public nuisance, and that no length of enjoyment would legalize the continuance of a mill-pond destructive to the health of the surrounding community.—*Mills v. Hall*, 9 Wend. 315.

[4.] The defendants, by a ditch upon their own land, withdrew the water from the creek, and returned it below the complainants' land, thus depriving the latter of the stream. The pond was a private nuisance to the upper proprietors, to the extent to which the water was thrown back upon their land, by reason of the increased elevation of the last dam, and its change of location. To this extent, they had a right to abate the nuisance, but to no greater extent. They had a right to lower the surface to the level at which it was before the erection of the last dam; and the regular and proper mode of doing it, would have been by lowering the dam.—Angell on Waters, §§ 390–391; *Moffett v. Brewer*, 1 Green, (Iowa,) 348; 1 Bish. on Cr. Law, § 700; *Rex v. Papineau*, Strange, 686; *Welch v.*

Stowell, 2 Douglass, (Mich.) 332. The right is, to "abate only so much of the thing as makes it a nuisance." The right of the defendants was, to lower the level so that the reflux would only be so great as the complainants had a right to produce. In the absence of a prescriptive right, they might lower the level, so that the reflow would stop at their boundary line. If there is a prescription, the depression of the level might be carried so far as to stop the reflux with the limit of the adverse user for ten years.

[5.] The defendants have not, according to the statements of the bill, done what we have above decided they had a right to do. They have diverted the stream from the complainants' land by a ditch; that ditch has been stopped up by complainants, and they intend to continue to open it as often as it is stopped. Their purpose is to divert the water from the complainants' machinery, which is valuable and extensive, and gives employment to a large number of hands. Upon these facts, irreparable mischief to the complainants, and a multiplicity of law-suits, would result, unless a court of chancery interposes. We decide, therefore, that the bill makes out a proper case for an injunction, restraining the defendants from diverting the stream from the complainants' premises. For principle involved, we refer to *Burden v. Stein*, 27 Ala. 104; 2 Story's Equity, § 925; Angell on Water-Courses, § 444.

No question arises as to a parol license to build the last dam to its present height, for the bill shows that the party who is alleged to have given the present license had no title to the land to be affected.

Reversed and remanded.

MILLER vs. THE STATE, USE, &c.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Limitations, statute of; whether applicable to suits by State.*—The act of 1843, (Clay's Digest, 329, § 93,) which prescribes ten years as the limitation to actions for the recovery of lands, does not apply to actions by the State, since the State is neither expressly named, nor clearly intended to be included in its provisions; but this principle does not extend to a suit brought in the name of the State, for the use of a particular township, to recover lands which constituted a part of the sixteenth section.
2. *Adverse possession of sixteenth section lands.*—The possession of a purchaser of sixteenth section lands, sold by commissioners under an order of the county court, who fails to pay the purchase-money according to the terms of his contract as by law prescribed, is not adverse to the township; nor does a purchaser at sheriff's sale, under execution against him, acquire any title as against the township; yet, if such sub-purchaser receives the sheriff's deed, takes and holds exclusive possession under it, claiming the land as his own, he may acquire title against the township by the statute of limitations; and neither the provisions of section 539 of the Code, nor the proviso to the act of 1840, (Clay's Digest, 528, § 37,) nor the proviso to the act of 1837, (*ib.* 525, § 21,) in reference to the title to the lands, prevent him from availing himself of the statute as a defense to an action by the township to recover the lands.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. NAT. COOK.

THIS action was brought in the name of the State, "for the use of township seventeen, range eleven, east, in the Coosa land-district," against Samuel Miller and others, to recover the possession of a tract of land, which was described in the complaint as "the north half of the north-east quarter, and the south half of the north-east quarter, of section sixteen in said township and range;" and was commenced on the 27th March, 1855. The action was defended by Miller alone, the possession of the premises being abandoned by the other defendants before the trial. On the trial, as the bill of exceptions shows, the defendant offered in evidence the entries on the records of the county

court, in the book appropriated to sixteenth section lands, showing an order for the sale of the land in 1837, several entries relating to the notes given by the purchasers, and a receipt signed by John Whiting, as cashier of the Branch Bank at Montgomery, dated December 20, 1838, acknowledging the receipt of the notes by the bank for collection. "The defendant proved, also, that said land was sold on the — day of —, 1837; that part of the land in controversy was purchased by James Abel, who paid a portion of the purchase-money, and gave notes, with sureties, at one, two, three, and four years after date, with interest, for the residue; that the remaining portion of the land was purchased at said sale by one John E. Clark, who paid part of the purchase-money, and gave similar notes for the residue; that said sale was made at auction, by the school commissioners of said township, was reported by them to the judge of the orphans' court of said county, and was approved by him; that said notes for the purchase-money were also returned by the commissioners to said judge, and were deposited by him in the Branch Bank at Montgomery; and that said commissioners, at said sale, executed and delivered to the purchasers the usual certificates of purchase; also, that at the spring term, 1842, of the circuit court of Randolph, a judgment was rendered in favor of said Branch Bank at Montgomery, against James Abel, Joseph Abel, and F. F. Adrian, for \$174 debt, besides costs, and another against John E. Clark, F. F. Adrian, and James B. Dawson, for \$205 20 debt, besides costs, that executions were regularly issued on these judgments, placed in the hands of the sheriff of said county, and by him levied on said lands as the property of said defendants in execution; that said sheriff sold said lands, on the first Monday in April, 1843, at public outcry, at the courthouse-door of said county, and conveyed them, by deed in the usual form, to the defendant in this action; and that said defendant paid the purchase-money bid by him, took possession of said lands, built houses, cleared up forty or fifty acres, resided upon, and cultivated said lands, claiming

them as his own, for more than ten years before the commencement of this suit. The defendant asked the court to charge the jury, that if they believed, from the evidence, that he had held the adverse possession of the land, under color of title, for ten years before the commencement of the suit, then they must find a verdict for him. The court refused to give this charge, and the defendant excepted to its refusal;" and he now assigns its refusal as error.

JNO. T. HEFLIN, for appellant.

SMITH & AIKEN, *contra*.

R. W. WALKER, J.—The limitations established by chapter 21, title 1, part 3, of the Code, apply only to causes of action accruing, and possessions commencing, on and after the 17th January, 1853; and as the possession of the defendant commenced prior to that time, in order to determine whether this suit was barred by lapse of time, we must look to the statutes of limitation in force when the Code was adopted.—Session Acts 1853–54, p. 71. The act of 1843 (Clay's Digest, 329, § 93) established ten years as the limitation of actions for the recovery of lands. But, as *laches* is not to be imputed to the government, statutes of limitations do not apply to the State, unless it is expressly named, or unless it is clear from the act that it was intended to include the State.—Angel on Lim. § 37, and cases cited; *State v. Joiner*, 23 Miss. 500. The State is not named in, and its rights are not affected by the act of 1843; and hence arises the question, whether this is such a suit by the State as falls within the spirit and meaning of the maxim, "*nullum tempus occurrit reipublicæ*."

By the act of congress of 2d March, 1819, for the admission of Alabama into the Union, the sixteenth section in every township was granted "to the inhabitants of such township, for the use of schools." This court has held, that the legal title to these lands could not vest in the inhabitants of the township, as they had no corporate

existence; nor could such a capacity be conferred on them by the act of congress. And the construction placed upon this act has been, that the grant is in perpetuity to the inhabitants of the respective townships; and that the legal title to the land is in the State, in trust for the inhabitants of the respective townships in which the land is situated. *Long v. Brown*, 4 Ala. 629, 331; Code, § 501. This trust the State has executed. As early as 1819, agents were appointed to take care of the lands; and, subsequently, school commissioners were appointed, and trustees required to be elected by the township, for the management of the land and the schools in each township; and the officers thus provided for were respectively declared bodies corporate. By the Code, the inhabitants of the respective townships are incorporated, and the election of school trustees provided for, who are entrusted with the management of the sixteenth section, and are expressly authorized to direct suits at law or in equity, in all cases affecting the interest of such township.—Code, § 546. It is not to be doubted, that, by virtue of the general authority conferred upon them by the law, as it stood before the Code, the commissioners were clothed with the power to direct suits to recover the possession of the sixteenth section, when it was improperly held by a third person.—Clay's Digest, 520, §§ 7-8; 521, § 9; 522, §§ 12-13.

In Indiana, in reference to a similar grant, it has been held, that the legal title did not pass to the State, but that it vested in the inhabitants of the township, as soon as they acquired a legal capacity to take by an act of incorporation.—*State v. Springfield Township*, 6 Indiana, 94-5; *State v. Newton*, 5 Blackf. 455. See, also, *Trustees v. The State*, 14 How. (U. S.) R. 268, 274-5. However this may be, there can be no doubt, that the beneficial ownership of the property is in the township, and that a suit for the recovery of the sixteenth section is a suit for the benefit of the inhabitants of the township, and not for that of the State at large.—Authorities, *supra*; *Money v. Miller*, 13 Sm. & M. 531. It is well settled, that the maxim, *nullum tem-*

pus, &c., applies only to the State at large, and not to the political subdivisions thereof. Hence, the statute of limitations runs against municipal corporations, and other authorities established to manage the affairs of the public subdivisions of the State.—*County of St. Charles v. Powell*, 22 Missouri, 525 ; *Lessee of City of Cincinnati v. Presbyterian Church*, 8 Ohio, 309 ; *Armstrong v. Dalton*, 4 Dev. 569 ; *Money v. Miller*, *supra*.

Though the State is a party to this suit, it has no real interest in the litigation. If there be a right of recovery, the property sued for belongs, not to the State, but to the township ; so that, in point of fact, the suit is substantially between the township and the defendant. The Code expressly provides that, in all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party on the record.—Code, §§ 2130, 2383. In our opinion, the rule that the statute of limitations does not run against the State, has no application to a case like the present, where the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person, who alone will enjoy the benefits of a recovery.—See *Parmelee v. McNutt*, 1 Sm. & M. 179, 182 ; *Hill v. Josslyn*, 13 S. & M. 597 ; *Money v. Miller*, 13 S. & M. 531 ; *Josslyn v. Stone*, 28 Miss. 753, 762 ; *Commonwealth v. Baldwin*, 1 Watts, 54–6 ; *Moody v. Fleming*, 4 Geo. 115, 119.

[2.] Was the defendant's possession *adverse* in such a sense as to draw to it the protection of the statute of limitations ? It appears that Abell and Clark, two of the defendants in the executions under which the defendant purchased, bought the land in controversy at sales made by the commissioners of the sixteenth section, and, having paid part of the purchase-money, and executed their notes for the balance, received the usual certificates of purchase from the commissioners. It does not appear that the balance of the purchase-money was ever paid by the defendants in execution. Having received and held possession under an

executory contract, with the terms of which they failed to comply, their possession was not adverse, and the statute of limitations did not run in their favor.—*McQueen v. Ivey*, 36 Ala. 312, and cases cited ; Clay's Digest, 525, § 21. It does not follow, however, from this, that the possession of the purchaser at the sale under executions against these vendees cannot be deemed adverse. The purchaser paid the price for which the land was sold at the execution sale, obtained the sheriff's deed, and took and held exclusive possession under it, claiming the land as his own. His possession was, therefore, under color of title, and adverse, although the defendants in execution had no estate subject to sale under execution, and the sheriff's deed passed no title to the purchaser.

It is true, that a purchaser at execution sale succeeds only to the title of the defendant in execution ; and, so far as the title is concerned, he takes the land in the same plight and condition in which it was held by the defendant in execution. It may be admitted, moreover, that, if a defendant in execution holds in subordination to a paramount title in another, and is estopped from setting up a title hostile thereto, the same *estoppel* would apply to the purchaser at the execution sale, by reason of the privity of estate between him and the defendant in execution. In the present case, the appellant acquired nothing by his purchase at sheriff's sale, not even the equitable title of the defendants in execution.—*Elmore v. Harris*, 13 Ala. 360. It may well be questioned, therefore, whether there was any such privity of estate between them as would bind the former by the same *estoppel* to which the latter was subject. However that may be, it does not affect the right of the defendant to avail himself of the statute of limitations, as a defense to this action.

Where a defendant in ejectment relies on his adverse possession for the period prescribed by the statute of limitations, as an answer to the action, he neither sets up title in himself, nor attacks that of the plaintiff ; but simply relies on his undisturbed adverse possession, as a bar to the

assertion of the legal title, which the very form of his defense concedes to the plaintiff. As was said by Spencer, J., in *Smith v. Bates*, (9 Johns. 180,) "whenever this defense is set up, the idea of RIGHT is excluded." "The bar of the statute is acknowledged to originate in wrong."—*Bradstreet v. Huntington*, 5 Peters, 439, 446; *Woodward v. Blanchard*, 16 Ill. 430; *Beverly v. Burke*, 9 Geo. 444. Where the statute of limitations is the defense relied on, the deed under which the party entered is not used for the purpose of proving title in him, but as explanatory of his possession; and it is the character of the possession, and not the validity of the title, which bars the entry of the owner.—See *Waldron v. Tuttle*, 4 N. H. 371; Angell, § 401.

In *Doe, ex dem. Ross v. Durham*, (4 Dev. & Batt. 54,) one of two tenants in common conveyed the whole land to another person, the purchaser being ignorant of the tenancy in common. It was held, that, inasmuch as the tenant in common who sold the land could not dispute the title of his co-tenant, the purchaser from him was in like manner estopped from doing so; but that the deed, under which the latter went into possession, was *color of title*, and his possession under it, for a sufficient length of time, would bar the remedy of the co-tenant. So, the identical principle here involved is asserted in the cases which decide, that where the defendant in execution holds only under a bond for title, and has not paid the purchase-money, the sheriff's deed to the purchaser at execution sale is nevertheless color of title, and, if the latter enters under it, is the starting point from which the statute of limitations runs in his favor against the true owner.—*Stamper v. Griffin*, 12 Geo. 450, 458; *Beverly v. Burke*, 9 Geo. 440, (443-4); *Hester v. Coats*, 22 Geo. 56, 58. See, further, Angell on Lim. § 440, note 3, §§ 386, 390, 401; *Clapp v. Bromagham*, 9 Cow. 554, 556-7-8; *Newman v. Chapman*, 2 Rand. 93; *Smilie v. Biffle*, 2 Barr, 52; *Woodward v. Blanchard*, 16 Ill. 433; *Northrop v. Wright*, 7 Hill, 476; *Sellers v. Cook*, 17 Ala. 752; *McQueen v. Ivey*, 36 Ala. 313; *Abercrombie v. Bradford*, 15 Ala. 370; *Herbert v. Hanrick*, 16 Ala. 595.

Neither the *proviso* to the act of 1840, (Clay's Digest, 528, § 37,) declaring that "the title to land sold as aforesaid shall never be divested out of the township, until the final payment of the debt and interest ;" nor the *proviso* to the act of 1837, (Clay's Digest, 525, § 21,) nor section 539 of the Code, has any application to this case. In our opinion, neither of the two *provisos*, nor the section of the Code referred to, was intended to cut off a party, in adverse possession under color of title, from the benefit of the statute of limitations.

It results, that the court erred in refusing to give the charge asked by the defendant.

Judgment reversed, and cause remanded.

HOOKS *vs.* BARNETT'S EXECUTOR.

[CONTESTED PROBATE OF WILL.]

1. *Special jurisdiction of register in chancery, sitting for probate judge.*

When the probate judge is incompetent to preside in the matter of the probate of a will, (Code, §§ 560, 1910-12,) the proceedings are not required to be instituted in the probate court, and thence transferred to the register in chancery, but may be commenced before the register; nor is it necessary, in such case, that the petition, propounding the will for probate, should show the incompetency of the probate judge, when his incompetency is otherwise shown by the record,—as by a recital in the minute-entry that the contestant is his mother-in-law.

APPEAL from the Register in Chancery, sitting for the Probate Judge of Pike.

IN the matter of the probate of the last will and testament of John Barnett, deceased, which was propounded for probate by Michael H. Barnett, the executor therein named, and contested by Mrs. Martha M. Hooks, who was a daughter of said testator. The petition for the probate

of the will was addressed to the register in chancery; but it did not allege the incompetency of the probate judge of the county to take jurisdiction of the cause, nor state any facts showing that he was incompetent; and the only allegation, in reference to the testator's heirs-at-law and distributees, was as follows: "Your petitioner further states, that the widow of said decedent is Mrs. Sophia Barnett, who resides in this county; and that his next of kin are his children—Michael H. Barnett, who is of full age, and resides in Montgomery county; Martha M. Hooks, widow of Thomas Hooks, also a resident of Pike county; James E. Barnett, a resident of Pike county; Jincey Woodward, wife of Stephen Woodward, a resident of Bibb county, Georgia; and Charles J. Barnett, a resident of Bastrop county, Texas,—all of whom are of full age."

The minute-entry of the register, setting a day for the hearing of the application, and ordering notices and subpoenas to issue, contains the following recital: "And it appearing to the court, from said petition, that said petitioner is one of the next of kin of said deceased, and also one of the executors named in said instrument; that Mrs. Sophia Barnett is the widow of said deceased, and resides in Pike county in this State; that said decedent left — children him surviving, to-wit: Jincey Woodward, wife of — Woodward, who is of full age, and resides near Macon P. O., in the State of Georgia; Charles J. Barnett, also of full age, who resides near Albade P. O., in the State of Texas; Mrs. Martha M. Hooks, widow of Thomas Hooks, late of this county, deceased, of full age, and who is the mother-in-law of Hon. Bird Fitzpatrick, judge of probate of Pike county," &c. In the written objections to the probate, filed by the contestant, the cause was described as pending before the register in chancery "because of the disqualification of the judge of probate of said county from relationship to the parties at interest."

Issue was joined between the parties, and the cause was submitted to a jury, who returned a verdict in favor of the will. The contestant then moved in arrest of judgment,

“and also to dismiss the suit, for the reason that this court has no jurisdiction thereof; and, in support of said motion, offered in evidence the original petition and the subsequent record of the proceedings in the cause.” The register overruled the motion, and rendered judgment according to the verdict; and his judgment and decree, to which the contestant reserved an exception, is now assigned as error.

JNO. A. ELMORE, for appellant.—The proceedings ought to have been instituted in the probate court, and transferred by that court, if the judge was incompetent to sit, to the register in chancery; and the reason of the transfer should have appeared of record. If the petition was properly filed with the register in the first instance, it should have stated the facts necessary to show his jurisdiction. There is nothing in the record to show that he had jurisdiction, except the recital of the minute-entry, that it appeared, “from the petition,” that the contestant was the mother-in-law of the probate judge, when the petition contains no such averment. The record does not show enough to sustain the proceedings, if collaterally assailed, much less on direct appeal.

STONE, J.—It is objected in this case, that the register in chancery for the 10th district does not appear by any thing in this record to have had jurisdiction of the contest of Mr. Barnett's will. The provisions of the Code, which bear on this question, are section 560, and sections 1910 *et seq.* We construed some of the features of these sections in *Wilson v. Wilson*, 36 Ala. 662–3–4–5. We do not assent to the proposition that, under these sections, it is necessary that the proceeding shall be first commenced in the probate court, and then, by an order of that court, transferred, if the presiding judge be on any ground incompetent to try it. Section 1911 provides for the removal of original papers, in case there are any to remove; but it can not, by any fair construction, be understood as requiring that there shall be original papers in the probate court

before the jurisdiction can attach to the court of the register.

It is contended, also, that the statement in the judgment-entry of the register, that among the children of testator is Mrs. Martha M. Hooks, "who is the mother-in-law of Hon. Bird Fitzpatrick, judge of probate of Pike county," is mere recital of what appeared on the face of the petition, and not an assertion that such was the fact. We think this position untenable. The petition contains no such statement; and if we were to rule in accordance with this argument, we should convict the register of placing on his record what was plainly untrue. Records import verity, and we are not to presume that judicial officers violate their duty.—*Deslonde v. Darrington*, 29 Ala. 92; 1 Greenl. Ev. §§ 19, 227; 1 Phil. Ev. (4th Amer. ed.) 642.

In support of this construction of the register's order, if support be necessary, it may not be out of place to state, that Mrs. Hooks was the sole contesting party in the court below; that she alone appeals, and assigns errors; and in the allegations filed by her against the probate of the will, she states that the will was propounded for probate before the register, "because of the disqualification of the judge of probate of said county, from relationship to the parties at interest." The question of jurisdiction was not raised in the court below, until after verdict was rendered on the issue, establishing the validity of the will.

Construing the order of the register as an affirmation that the contestant was related to the judge of probate within the degree which denied to him the right to preside in the trial, we think the register, sitting for the probate judge, rightly overruled the motion in arrest of judgment.

Affirmed.

BIBB vs. SHACKELFORD.

[BILL IN EQUITY TO RESTRAIN ERECTION OF MILL-DAM.]

1. *Dissolution of special injunction on answer.*—Where irreparable mischief might result from the dissolution of a special injunction, restraining the erection of a dam, which would create a malarious pond injurious to the health of the surrounding community, the chancellor may, in his discretion, retain the injunction until the hearing, notwithstanding the denials of the answer; but, if the chancellor, in the exercise of his discretion, dissolves the injunction on the answer, the appellate court will not reverse his decree, unless fully and satisfactorily convinced that he erred.

APPEAL from the Chancery Court at Montgomery.
Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 10th October, 1861, by Joseph B. Bibb, against George W. Shackelford and others; and sought to restrain the defendants from erecting a mill-dam across Pintlala creek at a point which was situated in the complainant's plantation. The lands surrounding the mill-site, through which said creek flows, once belonged to George Shackelford, since deceased, who was the father of the defendants, and who conveyed the said land, on the 2d March, 1849, to one Calloway, who afterwards sold and conveyed to Hiram Pierce and William T. Mason, who sold and conveyed it to Fleming Freeman, who, on the 29th December, 1857, sold and conveyed to the complainant; and copies of these several conveyances were made exhibits to the bill. The bill alleged, that said George Shackelford, while he owned the land, had a grist-mill on the creek; that after his sale and conveyance to Calloway, under some agreement between them, "he retained the possession and use of the mill, until about the year 1850, when the same was abandoned as useless, the dam having been broken, and has never since been repaired, or used, or been in the possession of any other person than the owner of said lands, until a short time ago, as herein-

after mentioned ;" that the defendants, a short time before the filing of the bill, asserting a claim of title to the mill-site under a written instrument, which purported to be executed by said Calloway to their father, (and a copy of which was made an exhibit to the bill, but which, if genuine and founded on sufficient consideration, the complainant insisted could have no effect against him as a purchaser for valuable consideration without notice,) entered on the lands, and commenced to rebuild the mill-dam; "that the said mill-dam, if erected, will cause complainant's lands to be overflowed and damaged by said creek, and will be a nuisance to his lands, as well as others in the neighborhood, by causing sickness ;" and that he would be compelled to abandon his settlement, to prevent sickness in his family, unless the erection of the dam was restrained.

A separate answer was filed by George W. Shackelford, who claimed to be in possession of the mill-site, and asserted title thereto under his father and a reservation in his father's conveyance to Calloway. In response to the allegation that the mill-pond would produce sickness, the answer contained the following statement: "Defendant has resided all his life, with short exceptions, in the neighborhood of said mill-site, and never before heard of any person who feared or believed that said pond would create sickness of any kind. On the contrary, defendant has been informed by Dr. W. H. Rives, a physician who resided for more than twenty years within one mile of said pond, that said pond did not, in his opinion, cause or create any sickness; and the same opinion has been expressed to defendant by many other persons residing in the immediate neighborhood. Defendant denies, therefore, both from his own knowledge, and from belief founded on knowledge obtained as aforesaid, that said pond will cause or create any sickness whatever." The defendant also demurred to the bill, for want of equity, and because the complainant had an adequate remedy at law.

The chancellor dissolved the injunction on the denials of the answer, and his decree is now assigned as error.

JNO. A. ELMORE, with whom was S. F. RICE, for the appellant, cited *McBrayer v. Hardin*, 7 Ired. Eq. 3 ; *Parrell v. Daniel*, 8 ib. 9 ; *Capeheart v. Moore*, Busbee's Eq. 30 ; *Lloyd v. Heath*, ib. 39.

WATTS, JUDGE, JACKSON & TROY, *contra*, cited *Hill v. Averett*, 27 Ala. 484 ; *Brooks v. Diaz & Co.*, 35 Ala. 599 ; *St. James' Church v. Arrington*, 36 Ala. 548 ; *Rosser v. Randolph*, 7 Porter, 245 ; 10 Ala. 64.

A. J. WALKER, C. J.—Special injunctions are contradistinguished from injunctions designed to restrain proceedings in courts of common law, which, in England, are granted upon the defendant's default.—3 Dan. Ch. Pl. & Pr. 1811 ; 1 Hoff. Ch. Pr. 78. The dissolution of special injunctions, when the equity of the bill is controverted in the answer, is usually a matter of course, but, *to prevent irreparable mischief*, the chancellor is clothed with a discretion over the subject ; and the injunction may, therefore, in proper cases be retained, notwithstanding the negation of all equity by the answer.—*Poor v. Carlton*, 3 Sumner, 70 ; *Clum v. Brewer*, 2 Curtis, 506, 518 ; *Hollister v. Barkley*, 9 N. H. 230 ; *Orr v. Littlefield*, W. & M. 19 ; *Attorney General v. Bank*, Walker's Ch. R. (Michigan,) 90 ; *Brooks v. Diaz*, 35 Ala. 599 ; 3 Leading Cases in Equity, 204.

Some of the decisions go so far as to maintain the proposition, that the question of the dissolution of all injunctions is left to the discretion of the chancellor, "on a full and liberal view of all the circumstances, which make for or against the dissolution."—*Boyd v. Anderson*, 2 Johns. Ch. 202 ; *Loyless v. Howell*, 15 Ga. 554 ; *Semmes v. Mayor of Columbus*, 19 Ga. 471 ; *Cox v. Mayor of Griffin*, 18 Ga. 728 ; *Crutchfield v. Danilly*, 16 Ga. 432 ; *West v. Rouse*, 14 Ga. R. 715 ; *Swift v. Swift*, 13 Ga. 140 ; *Dent v. Summerlin*, 12 Ga. 5 ; *Holt v. Bank of Augusta*, 9 Ga. 552 ; *Hemphill v. Bank*, 3 Kelly, 432. Upon this proposition we do not now announce an opinion.

The injunction here was special. The merits of the case,

for the purpose of the question in hand, centre in the allegation, that a dam, which the defendant was erecting, would produce a malarious pond, and injuriously affect the health of the community. This the defendant denied. Notwithstanding this denial, the chancellor had a discretion as to the dissolution of the injunction. The authorities show that, in many cases, where irreparable injury might result from a dissolution, if the bill should be really true, although denied by the answer, the injunction has been retained.—*Troy v. Norment*, 2 Jones' Eq. 318 ; *Lloyd v. Heath*, Busbee's Eq. 39 ; *James v. Lemly*, 2 Ired. Eq. 278 ; *Swindall v. Bradley*, 3 Jones' Eq. 353 ; *McBrayer v. Hardin*, 7 Ired. Eq. 1. In this case, if the bill be true, a dissolution of the injunction, followed by the erection of the defendant's dam, would cause injury to health, and, perhaps, loss of life. This case is, therefore, of that class in which the chancellor would, in the exercise of his discretion, ordinarily retain the injunction until the hearing, notwithstanding the denial of the answer.

There are some circumstances presented here, which doubtless controlled the chancellor's discretion, and led him to dissolve the injunction. The bill alleges no facts, from which the pernicious influence of the contemplated pond could be inferred with certainty. It states that from which the probability of the production of sickness might be argued. Beyond that, the case rests upon the naked assertion, that the pond will produce sickness. This assertion is not shown to have any other basis than the judgment of the plaintiff. It is a fact in the case, undeniable, because it is indicated in a title-paper, and shown in the bill and answer, that a dam had before stood at the same place, where the defendant was about to erect his dam. A strong argument for or against the proposition, that the pond would produce sickness, was deducible from the effect of the previous pond. If the former pond had been unhealthy, it is fair to infer that the complainant would have alleged the fact, which would have so much strengthened his case. His failure to allege that fact goes far to show that it did not

 Nuckolls v. Pinkston.

exist, and, therefore, could not be alleged. We are, for that reason, justified in giving full credence to the assertion of the answer, that a pond had existed for many years, in precisely the same locality, without in any degree injuring the health of the community, or, indeed, being suspected of having that effect.

The Georgia supreme court refuses to reverse the chancellor's decree, made in the exercise of his discretion, unless it has been *flagrantly* abused.—*Loyless v. Howell*, 15 Ga. 554. See, also, *Jeter v. Jeter*, 36 Ala. 391. We think we may safely go so far as to say, that we will not reverse such a decree, unless we feel a full and satisfactory conviction that the chancellor has erred. We are not sure that, in the exercise of our judgment, we would have dissolved the injunction; but, when we weigh the circumstances above referred to, we can not feel such a conviction that the chancellor has erred, as will justify us in reversing his decree.

Affirmed.

NUCKOLLS vs. PINKSTON.

[DETINUE FOR SLAVES, AGAINST SHERIFF.]

1. *To what witness may testify.*—A witness cannot be allowed to testify that a person "was insolvent," although he states that he "knows the fact of his own personal knowledge."
2. *Separate estate of married woman under chancery decree; in whom legal title vests.*—Where the future earnings of a married woman are settled on a trustee for her separate use, by a decree in chancery rendered under the 4th section of the act of January 31, 1846, and she afterwards purchases a slave with her separate earnings, the legal title vests in the trustee to whom the vendor's bill of sale purports to convey it for her separate use, and not in the trustee named in the decree.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by James K. Pinkston, "trustee of Matilda S. Pinkston, his wife, and who sues for her use," against Geo. B. Nuckolls, to recover two slaves, together with damages for their detention; and was commenced on the 10th January, 1854. The defendant pleaded the general issue, and a special plea *puis darrein continuance*, averring the death of Mrs. Pinkston after the commencement of the suit; and issue was joined on both of these pleas. On the trial, as the bill of exceptions shows, the plaintiff offered in evidence a certified transcript of the record of a chancery suit, instituted by Mrs. Pinkston, suing by her next friend, against her said husband, James K. Pinkston, for the purpose of having her future earnings and acquisitions settled on a trustee for her sole and separate use, as authorized by the 4th section of the act approved January 31, 1846; in which a decree was rendered, on the 23d July, 1850, in the following words: "It is therefore adjudged and decreed, that all the earnings and accumulations of the complainant, Matilda S. Pinkston, resulting hereafter from her labor and industry, be vested in Moses McLemore, for the sole and separate use of the said Matilda S. Pinkston, the same as if she was sole and unmarried." The slaves were purchased by Mrs. Pinkston on the 4th December, 1851, and, as the plaintiff contended, were paid for with money arising from her separate earnings after the rendition of this decree. The bill of sale, which was offered in evidence by the plaintiff, was dated December 4, 1851, and was in these words: "In consideration of the sum of \$1625, to me in hand paid by Mrs. Matilda S. Pinkston, I have bargained, sold, and delivered, and do, by these presents, bargain, sell, and deliver, to James K. Pinkston, in trust for the sole and separate use of the said Matilda S. Pinkston, two slaves," &c. The defendant, as sheriff of Macon county, levied an execution on the slaves, as the property of James K. Pinkston, on the 14th December, 1853; and the evidence adduced by him tended to show, that the purchase-money paid for the slaves "was the proceeds of the labor of certain other slaves, which were placed by said James

K. Pinkston under the control of his wife, in 1839-40, under an agreement between them which was void as to his existing creditors, and which did not create any separate estate in her;" and that the decree in chancery, on which said execution was issued, was founded on an indebtedness which existed in 1838. It was admitted, that Mrs. Pinkston died in July, 1857.

"The plaintiff offered to prove, that James K. Pinkston had a large amount of property in his possession, in the years 1839 and 1840, and was then in good credit. The defendant objected to this proof, as illegal and irrelevant; but the court overruled his objections, and admitted the evidence; to which the defendant excepted. The plaintiff asked a witness, whether or not James K. Pinkston was insolvent in 1849-50. The defendant objected to this question, on the ground that it called for evidence which was illegal, irrelevant, and improper; but, the witness having stated that he knew the fact of his own personal knowledge, the court overruled the objection, and permitted the witness to testify that said Pinkston was insolvent in 1849-50; to which the defendant excepted. The defendant adduced evidence tending to show, that Moses McLemore, the trustee named in said chancery decree, accepted the trust conferred by said decree, and acted under the same; and there was no evidence that said McLemore had ever resigned the said trust, or been removed, or had at any time failed or refused to act."

"Upon the foregoing evidence, the court charged the jury—1st, that although James K. Pinkston was the husband of Mrs. Matilda Pinkston, and although Moses McLemore had been appointed trustee of Mrs. Pinkston under the decree in chancery which had been read in evidence, and had accepted the trust; yet, by the bill of sale for the slaves in evidence before them, the legal title to said slaves vested in James K. Pinkston, and did not vest in said McLemore by virtue of said decree; nor did the death of Mrs. Pinkston, since the commencement of this suit, terminate plaintiff's right to prosecute the suit to judgment."

This charge of the court, to which the defendant reserved an exception, and the rulings of the court on the evidence, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellants.

A. J. WALKER, C. J.—In permitting a witness to state, notwithstanding the defendant's objection, that Pinkston was insolvent, the court violated a principle announced in *Brice & Co. v. Lide*, 30 Ala. 647, and committed an error for which we must reverse the judgment.

We do not now perceive that the evidence as to Pinkston's pecuniary condition in 1839 or 1840, had any relevancy to the case; but, as there may be some aspect in which it had some bearing upon some question of the case, which has escaped our attention, we forbear to decide positively that it is irrelevant.

[2.] One of the objections to the first charge given, is rather a criticism upon, than a controversy of the principle which the judge intended to assert; and it may be obviated upon another trial, by attention to the language used. The other objection is more grave and important. It presents this question: where a married woman was, by a decree under the 4th section of the act of 31st January, 1846, invested with a separate estate in her subsequent earnings and accumulations, and a trustee was appointed, does the legal title to personalty purchased by her with her earnings vest in the trustee, to whom, for her sole and separate use, the conveyance by the seller was made, or in the trustee appointed by the court? The legal title was in the seller, up to the time of sale; and it passed from him, only by virtue of the conveyance. It could not pass to a different person from the one to whom the conveyance was made. We can not subscribe to the proposition, that the appointment of a trustee of a married woman's earnings by the chancery court precludes the possibility of the investiture of a different person with the legal title of property purchased with those earnings for her use. If such were the law, we would have the anomalous result, that in all cases of invol-

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untary trusts, or trusts *in invitum*, the party upon whose conscience equity forced the trust, would be deprived of the legal title, and it would be vested in the trustee appointed by the chancery court.

For the error above pointed out, the judgment of the court below is reversed, and the cause remanded; the reversal to take effect as of the 13th day of February, 1860, when the cause was submitted.

STEWART vs. RUSSELL.

[ACTION ON BILL OF EXCHANGE, BY ENDORSEE AGAINST ENDORSER.]

1. *Proof of protest; charge invading province of jury.*—In an action on a foreign bill of exchange, by an endorsee against his endorser, the only evidence of protest being the deposition of the notary, and a copy of the protest; which copy, though appended to his deposition as an exhibit, does not appear to have been certified or authenticated otherwise than by the deposition,—the court is not authorized to instruct the jury, that the deposition and exhibit “are, of themselves, sufficient evidence of the protest of the bill.”

APPEAL from the Circuit Court of Madison.

Tried before the Hon. W. M. BROOKS.

THIS action was brought by Robert F. Russell, against William Stewart; was commenced on the 18th July, 1855; and was founded on a bill of exchange for \$2,554 17, which was drawn by Robert Freeman, at Huntsville, Alabama, on the 6th February, 1854, on Bradley, Wilson & Co., at New Orleans, payable to John W. Weaver, by whom it was endorsed to the defendant, who endorsed it to the plaintiff. On the trial, as the bill of exceptions states, “for the purpose of showing that the plaintiff had discharged him from liability on his endorsement, the defendant proposed to read in evidence the proceedings had in an attachment suit, instituted by the plaintiff against Robert Free-

man, the drawer of the bill here sued on ; to which the plaintiff objecting, the same was excluded by the court ; to which ruling the defendant excepted." The attachment against Freeman was sued out on the 6th November, 1854, and was levied on several mules, oxen, hogs, various farming utensils, &c. ; and the suit was regularly prosecuted to judgment on the 30th August, 1855.

"The defendant also excepted to the charge of the court, that the exhibit, together with the depositions accompanying the same, viz., " (setting them out,) "were sufficient evidence, of themselves, of the protest of the bill here sued on ; there being no other evidence of said protest." The depositions referred to are those of H. B. Cenas, the notary by whom the bill was protested, and A. Commanduer and C. F. Barry, the witnesses who attested the protest. Cenas testified, that he was a notary-public at New Orleans, duly commissioned and qualified ; "that, as such notary, he did, on the 6th March, 1855, duly and legally protest a certain draft," &c., describing the bill ; "that presentation for payment of said draft was made by him on the drawees, through their Mr. Wilson, at their counting-house in said city of New Orleans, on the day of said protest, and payment was refused ;" "that the annexed exhibit, marked 'A', is a true and correct copy of the original protest on file and of record in his office, and is made a part of his deposition ;" also, that he sent notices of protest, &c. Commandeur and Barry testified, "that they were witnesses to the protest referred to in the foregoing deposition of H. B. Cenas, and know that the facts therein stated by him are true and correct ; having carefully read said deposition, and examined the original protest, the annexed exhibit, marked 'A', and the draft thereto attached." "Exhibit A", referred to in the depositions, is a copy of the protest, in the usual form, and of the notary's certificate in reference to the notices sent by him ; and the following certificate is appended to it : "I certify the foregoing to be a true copy of the original protest, draft, and certificate of the manner in which the notices were served, on file and of record in

my office. In faith whereof, I grant these presents, under my signature and seal of office, on this 16th day of February, A. D. 1857." (Signed "H. B. Cenas, notary-public," and official seal attached.)

The rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

S. D. J. MOORE, for appellant.

WALKER & BRICKELL, *contra*.

STONE, J.—The testimony which tended to prove protest of the bill of exchange, which was the foundation of the present suit, was that of three witnesses, who produced what they testified was a copy of the protest. We are not informed that there was any conflict of the evidence on this point. The court charged the jury that "the exhibit, (copy of the protest attached to the depositions,) "together with the depositions accompanying the same, was sufficient evidence, of themselves, of the protest of the bill here sued on." The exhibit does not appear to have been a certified copy, nor to have been authenticated, otherwise than by said depositions. The objection urged to this charge is, that it invaded the province of the jury, by assuming the credibility of the testimony, without referring that question to the jury.

There is, at least, an apparent conflict in the decisions of this court on the question we are considering. *Williams v. Shackelford*, (16 Ala. 318,) and *Nelms v. Williams*, (18 Ala. 653,) give countenance to the idea, that when there is no conflict in the evidence, the court may charge positively, without hypothesis. These two cases, it will be seen, are rested on the authority of *Henderson v. Marberry*, 13 Ala. 713. In the case last cited, the charge expressly referred to the jury the question of the credibility of the testimony; and, hence, did not sustain the latter cases of *Williams v. Shackelford*, and *Nelms v. Williams*. There were also, in the cases last cited, some peculiarities of circumstances.

In our later decisions, we have not followed the lead of

the two cases from 16th and 18th Alabama Reports, but have held, that on questions of fact, dependent on oral testimony, if there be any evidence before the jury bearing on the point, the decision is for the jury, and can not be pronounced by the court.—See *Hollingsworth v. Martin*, 23 Ala. 598; *McKenzie v. Stevens*, 19 Ala. 691; *Hopkins v. Scott*, 20 Ala. 185; *Stokes v. Jones*, 21 Ala. 736; *Abney v. Pickett*, *ib.* 741; *Thompson v. State*, 30 Ala. 28; *Hughes v. State*, *ib.* 45; *McDougald v. Rutherford*, *ib.* 253; *Carter v. State*, 23 Ala. 430; *Rigby v. Norwood*, 34 Ala. 132; *Shep. Digest*, 459–60, §§ 13, 14, 24, 25, 30, 32, 36.

In the present case, the court assumed as a fact that which it was the province of the jury to find; and, however conclusive the testimony may be supposed to have been, still we think it much safer not to open the door to so dangerous an innovation.

We deem it unnecessary to inquire whether there is any thing in the objection, that the evidence offered of protest is secondary—a mere copy—without accounting for the absence of the original. If the original be contained in an office book, or *quasi* record, that fact can be shown on another trial.

In the other rulings of the court we find no error; but, for the error in the charge above pointed out, the judgment of the circuit court is reversed, and the cause remanded.

WOODALL vs. McMILLAN.

[TRESPASS FOR FALSE IMPRISONMENT.]

1. *Form of complaint*.—A count which avers that the defendant, “maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned on a charge of perjury” is in trespass; and so is a count which avers that the defendant “falsely imprisoned plaintiff, and detained him in prison and custody, without any reasonable or probable cause therefor, contrary to law, and against his will.”

2. *Criminal jurisdiction of justice limited to county.*—A justice of the peace has no authority, under our statutes, to issue a warrant for the arrest of a person in his county, on an affidavit charging him with the commission of a criminal offense in another county; such warrant, therefore, and all proceedings had under it, are absolutely void.
3. *Void legal proceedings admissible evidence in mitigation.*—In trespass for false imprisonment, the void warrant of arrest, and proceedings had under it, are admissible evidence in mitigation of vindictive damages.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. S. D. HALE.

THIS action was brought by John H. McMillan, against Presley R. Woodall; and was commenced on the 6th February, 1860. The original complaint contained only a single count, claiming damages of the defendant "for maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on a charge of perjury, for the space of twenty days"; and a second count was afterwards added, which claimed damages "for this—that the defendant, on the 16th February, 1859, falsely imprisoned plaintiff, and then detained him in prison and custody, without any reasonable or probable cause therefor, for the space of forty-eight hours then next following, contrary to law, and against the will of plaintiff." On the trial, as appears from the bill of exceptions, the plaintiff proved the affidavit made by the defendant to procure his arrest, the warrant of arrest, and the proceedings had under it. The affidavit was made by the defendant, before one Samuel Hill, an acting justice of the peace in and for Marshall county; and charged the plaintiff with the crime of perjury, in making a false affidavit before the register of the land-office at Huntsville, in relation to the entry of a tract of land. The plaintiff was arrested under a warrant issued by the said justice, and was carried before an acting justice in Madison county, where a preliminary examination was had, and the prosecution ended. The defendant accompanied the constable who made the arrest, and appeared on the trial before the justice as prosecutor. The defendant read in evidence, without objection, the

affidavit made by the plaintiff before the register of the land-office at Huntsville, and adduced evidence showing that said affidavit was false, and that he himself was informed of these facts when he made the affidavit for the plaintiff's arrest; and the plaintiff adduced rebutting evidence. "This being all the evidence, the court charged the jury, that said warrant of arrest was totally void, and of no effect; that all action under it was void and illegal, and afforded no grounds for plaintiff's arrest and imprisonment, nor any excuse for acting under it; that no probable cause for believing that plaintiff was guilty of perjury should be regarded by them as an excuse for acting under said warrant, or as a defense in this action; that if they believed the defendant was in any way concerned in causing said warrant of arrest to issue, or in any way assisted to arrest or imprison the plaintiff under it, he was equally guilty with everybody concerned with said arrest and imprisonment, and they should find for the plaintiff, and pay no regard to any proof of probable cause offered by the defendant." The defendant excepted to the charge of the court, and he now assigns it as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

A. J. WALKER, C. J.—The complaint in this case follows substantially the form prescribed by the Code, and is in trespass.—*Williams v. Ivey*, 37 Ala. 242, 244.

[2.] A justice of the peace, except in the few instances especially mentioned in our statutes, has no jurisdiction beyond the limits of his county. The justice for Marshall county had no authority to act upon the complaint of the defendant, on account of a crime committed in Madison, and issue a warrant for the arrest of plaintiff upon the charge of such crime. Therefore, the warrant under which the arrest of plaintiff was made, was void.

[3.] The affidavit, warrant, and proof of arrest under the assumed authority of the warrant, were matters proper for the consideration of the jury, in determining the ques-

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tion of malice, and ascertaining the amount of damages. The evidence was entitled to consideration in mitigation of vindictive damages. The court erred in instructing the jury not to regard such evidence.—*Savage v. Gunter*, 32 Ala 467; *Williams v. Ivey*, *supra*.

Reversed and remanded.

WILEY, BANKS & CO. vs. BOYD ET AL.

[BILL IN EQUITY BY CREDITOR TO ESTABLISH AND ENFORCE MORTGAGE.]

1. *Assignment and extinguishment of mortgage*.—A creditor may buy in an outstanding mortgage on his debtor's property, take an assignment of it to himself, and have it foreclosed for his benefit; but, if he simply pays the mortgage debt, and takes from the debtor another mortgage on the property, the former mortgage is thereby extinguished; and a court of equity will not establish and enforce it for his benefit, as against purchasers at execution sale against the mortgagor, after the second mortgage has been declared fraudulent and void as to other creditors.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellants, on the 7th February, 1859, against J. A. & W. H. Knight, Lewis T. Wimberly, James C. Boyd, and others; and sought to establish and enforce, for the benefit of the complainants, a mortgage on certain real and personal property, which the said J. A. & W. H. Knight had executed to said Wimberly on the 2d January, 1851, to secure the payment of a promissory note therein described. The material facts of the case, as alleged in the bill, are these: On the 9th February, 1852, J. A. & W. H. Knight were indebted to the complainants in a large amount, for goods sold and delivered; and the complainants' claims against them were in the hands of F. M. Reese, an attorney, for collection. At

the same time, the Knights were indebted to Wimberly, and had given him a mortgage on a tract of land and several slaves, which was dated the 2d January, 1851, and the law-day of which was the 25th of December, 1851; and Wimberly was about to sell the property under the mortgage. Reese thereupon paid Wimberly the amount of his debt, and took from the Knights another mortgage, which embraced all the property covered by the former mortgage, in addition to other property owned by the mortgagors; and this latter mortgage, the law-day of which was the 1st January, 1858, was intended to secure to the complainants the debt which the Knights owed them, and the amount thus paid by them to Wimberly. On the 3d January, 1853, the complainants filed their bill in chancery, asking a reformation of this mortgage, and an injunction against several judgment creditors of the mortgagors who had levied executions on the property. On final hearing in that case, the chancellor held the mortgage fraudulent and void; and his decree was affirmed by this court on appeal, at its June term, 1855.—See the case reported in 27 Ala. 336–50. The property was afterwards sold under the executions of the judgment creditors, and the several purchasers at the sheriff's sale was made defendants to the bill in this case. The statements of the bill, showing the rights asserted by the complainants under the mortgage to Wimberly, are copied in the opinion of the court. The prayer of the bill was, that the complainants might be subrogated as equitable assignees to Wimberly's rights under the mortgage to him, and that the property might be resold under it. The chancellor sustained a demurrer to the bill, for want of equity; and his decree is now assigned as error.

W. P. CHILTON, for appellants, cited *Johnson v. Hart*, 3 John. Cas. 329; *Peltz v. Clarke*, 5 Peters, 481; *Heath v. West*, 6 Foster, (N. H.) 191; *Willard v. Harvey*, 5 N. H. 252; *Starr v. Ellis*, 6 Johns. Ch. 393.

CLOPTON & LIGON, *contra*, cited *Harvey v. Hurlburt*, 3 Vermont, 561; *Hatch v. Kimball*, 4 Shep. 146; *Campbell*

v. Knight, 11 Shep. 332; *Tatum v. Hunter & Thomas*, 14 Ala. 557.

STONE, J.—In the case of *Wiley, Banks & Co. v. Knight*, (27 Ala. 337,) the complainants in the present suit sought to enforce a mortgage made by J. A. & W. H. Knight, to secure a debt to complainants of nine thousand five hundred dollars. Part of the consideration of that mortgage was a debt due from the Knights to complainants, and the other part, as the report of that case shows, arose as follows: “The Knights had previously executed a mortgage to one Wimberly on a part of said property, to secure a debt then due and owing from them to him of four thousand four hundred and sixty dollars; that said mortgage to Wimberly had been duly recorded, and was a valid and subsisting lien on the property covered by it; that complainants, being wholly unable to obtain any security for their said debt without assuming said Wimberly’s debt, did assume said debt, and have since paid a large portion of it, and hence the amount of their mortgage debt is these two debts combined.” The object of that bill was to secure to complainants the property conveyed by the mortgage to them, against execution creditors of the said Knights. By the judgment of this court, the mortgage from the Knights to complainants was pronounced fraudulent against the creditors of the Knights; and the bill filed by Wiley, Banks & Co. in that case was dismissed on that ground.

It was argued in that case, that if the mortgage to Wiley, Banks & Co. were pronounced fraudulent, then the mortgage to Wimberly should be set up for their benefit. To that argument this court responded: “To proceed and render a decree, setting up the Wimberly mortgage, and pronouncing that void which is set up in the bill, would be to render a decree which would not only be unsupported by the allegations of the bill, but predicated upon a state of facts precisely the opposite of those which are charged; for it would be to declare null and void a deed which the complainants set up as valid and effectual, and

on which they ground their title for relief, and to set up a deed as subsisting which the complainants allege has been fully paid and discharged. So that, without intending to decide whether complainants can have any relief on account of their payment of the mortgage to Wimberly upon a proper application, it is clear they can obtain no relief under the case as now presented."

After that decree was pronounced, the execution creditors of the Knights sold the property covered by the mortgage to Wimberly, and various persons became the purchasers at the execution sale. Those persons are made defendants to this suit; and the object of the present bill is to set up the Wimberly mortgage, for the benefit of Wiley, Banks & Co., and to have the property, thus sold, condemned to resale under the Wimberly mortgage, of which the complainants claim the ownership. The averments of their bill, bearing on the question of their claim to the mortgage and the debt secured by it, are the following:

"And the debt of the said Knights to the said Wimberly being past due, and the said Wimberly being about to sell the said property embraced in said exhibit C," [the mortgage,] "which had been duly recorded, and constituted a valid and subsisting lien on said property in favor of said Wimberly," Frank M. Reese, esq., "was authorized, as the agent and attorney of orators, to pay up to said Wimberly the said amount due from said Knights, and to take up from said Wimberly the said notes of said Knights, and to take from said Knights a deed of trust, or mortgage, on the same property embraced in said first deed, with other property owned by said Knights, to secure not only the sum paid to said Wimberly by your orators, but also the amount due your orators for goods said Knights had purchased from them as before stated. 2.—Thereupon, on the 9th day of February, 1852, orators, through their agent and attorney, F. M. Reese, agreed to become responsible to pay, and did pay shortly thereafter, to the said Wimberly, the amount of his said note, less the sum of fifty-four 18-100 dollars, which had been previously arranged, and

took up the said Wimberly's note for \$4,460 64, which note they now hold, a true copy of which is hereto attached, marked exhibit B." "3.—That your orators, through their said agent and attorney, took the mortgage or deed of trust aforesaid, marked exhibit C, and now hold the same uncanceled and unsatisfied, but a subsisting lien in favor of orators upon the property therein mentioned."

* * * "6.—Orators charge, that they are the equitable holders and owners of said trust deed to said Wimberly, having advanced to him the amount due thereon; and being the holders of his note on said Knights, as well as of the mortgage given to secure the same, which was duly recorded, and has never been paid, satisfied, or discharged, by said Knights, or either of them, or by any one else."

Various demurrers were interposed to this bill; and the question is presented, whether it makes a case for relief in favor of Wiley, Banks & Co.

The principle seems to be settled, that an incumbrance on property will be kept alive, or considered cancelled, accordingly as the one or the other result will best subserve the purposes of justice, and carry out the intention of the parties. Chancellor Kent thus expressed himself, in the case of *Starr v. Ellis*, 6 Johns. Ch. 395. He added, "It must, at all events, be an innocent purpose, and injurious to no one."

In the case of *Hatch v. Kimball*, (16 Maine, 149,) the court said, "If, at the time the mortgage is taken in, the intention to extinguish it appears, that is decisive." In the same case it is said, at another place: "The deed of release recites a payment of the balance due upon the mortgage, and there is nothing in the transaction to show that it was intended to be kept alive. The tenant has, for a long time, conducted as if he considered it extinguished. And it is now only to be kept on foot, by calling in aid the equitable principle, that it was most for his interest. This equitable presumption can not be admitted, because it is rebutted by a stronger equity," &c.

The case of *Poole v. Hathaway*, (22 Maine, 85,) asserts

the principle in language very like that employed by Chancellor Kent in *Starr v. Ellis*, *supra*. See, also, *Clabough v. Byerly*, 7 Gill, 362-3.

In the present case, the complainants, no doubt, charge the facts of their case as favorably to themselves as truth would allow. They do not affirm that there was any intention to keep the Wimberly mortgage alive, nor is such intention inferable from the statements of their bill. On the contrary, it is manifest from their averments that such was not their intention. The law-day of the Wimberly mortgage had matured when the complainants took up the note of forty-four hundred and sixty dollars. The law-day of the second mortgage was fixed six years later. It certainly never was intended to foreclose until the maturity of the second mortgage; and it is equally clear to our minds that Wiley, Banks & Co. did not intend, at that time, to assert any claim under the Wimberly mortgage. They nowhere assert in their bill, that they purchased the Wimberly note, or took an assignment or transfer of it; nor do they make any equivalent assertion. Their language is, that they *paid* the note to Wimberly. Payment of the debt is an extinguishment of the mortgage; for where there is no debt, there is no mortgage.—*Armitage v. Wickliffe*, 12 B. Monroe, 497; *Ladd v. Wiggin*, 35 N. H. 426; *Roundtree v. Holloway*, 13 Ala. 357; *West v. Hendrix*, 28 Ala. 226; 1 Hilliard on Mortgages, 215, *et seq.*; *Davis v. Maynard*, 9 Mass. 247; *Foster v. Athenæum*, 3 Ala. 302; *Sanders v. Watson*, 14 Ala. 198.

We think the bill fails to make a case for relief against the purchasers at execution sale; and the result is, that the decree of the chancellor is affirmed.

LOCKHART vs. WOODS.

[ACTION ON ATTACHMENT BOND.]

1. *Defense not limited to ground stated in affidavit.*—In an action on an attachment bond, the defense is not limited to proof of the particular facts stated in the affidavit for the attachment, but may be rested on the existence of any one of the several grounds which authorize the issue of an attachment.
2. *Proof of debtor's pecuniary condition.*—Although neither indebtedness, nor pecuniary embarrassment, nor even insolvency, on the part of a debtor, can justify the wrongful, or mitigate the malicious suing out of an attachment against him; yet, in an action on the bond, it being shown in defense that, at the time the attachment was sued out against him, he was about to dispose of his slaves, and had already disposed of his other personal property at an inadequate price, evidence of his embarrassed pecuniary condition at the time is admissible, because pertinent to the question of the *bona fides* of the conveyances.
3. *Same, in rebuttal.*—In such case, it is permissible for the plaintiff to rebut the evidence as to his pecuniary embarrassment, by proof of outstanding accounts due to him as a physician; but, where such proof is made by his own books, it must be accompanied with evidence showing the correctness of the accounts as charged; nor are the assessor's books, showing the amount of his taxable property as assessed that year, competent evidence for him.
4. *Proof of issue and levy of other attachments.*—The defendant may show, in defense of the action, as tending to rebut the presumption of malice, the issue of another attachment, and notice thereof to himself, the day before his own attachment was sued out; *secus*, as to an attachment of which he had no notice.
5. *Attachment wrongful, if no debt; general charge on evidence.*—Where there is no debt owing from the defendant to the plaintiff in attachment, the condition of the bond is broken, and the obligee is entitled to recover, in an action on the bond, at least nominal damages, or such actual damages as he may have sustained; and if there is no proof whatever of the existence of any debt, the court may instruct the jury, without hypothesis, to find for the plaintiff.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Charles H. Lockhart, against Thomas G. Wood, John M. Philips, and Walter H. Weems; was commenced on the 24th July, 1860; and was founded

on an attachment bond, executed by the defendants, the condition of which was as follows: "Whereas, the above-bound Walter H. Weems, as one of the attorneys of the said Thomas G. Wood, has, on the day of the date hereof, prayed an attachment, at the suit of the said Thomas G. Wood, against the estate of the said Charles H. Lockhart, for the sum of fifty-seven dollars, and has obtained the same returnable to the next term of the circuit court of Russell, to be held on the fourth Monday in March, 1860: now, if the plaintiff shall prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by reason of the wrongful or vexatious suing out of said attachment, then this obligation to be void," &c. The complaint contained two counts; the first alleging the execution of the bond, and claiming the amount of the penalty; the second setting out the condition, and alleging, as a breach thereof, that the attachment was wrongful and vexatious, and that the defendants had failed to pay plaintiff the damages thereby sustained by him. The defendants pleaded the general issue, "in short by consent, with leave to give in evidence any special matter of defense; and with like leave to the plaintiff to give in evidence any facts which would sustain any replication or assignment of breaches."

On the trial, as the bill of exceptions shows, the plaintiff read in evidence the record of the attachment suit. The record showed that the attachment was sued out by Walter H. Weems, as attorney for Thomas G. Wood, on the 21st March, 1860, on the ground that the defendant therein was about to remove his property beyond the limits of the State, so that the plaintiff would probably lose his debt, or have to sue for it in another State; and that on the 3d of April, 1860, the suit was dismissed, and judgment for costs rendered against the plaintiff in attachment. The plaintiff further proved, that at the time said attachment was sued out against him, he was a resident citizen of said county, had possession of a house and lot in the town of Crawford, and had been a practicing physician

there for several years; and that the property seized under the attachment was worth between five and six thousand dollars. The defendants then introduced one Harris as a witness, who testified to repeated conversations between himself and the plaintiff, two or three weeks prior to the suing out of the defendant's attachment, in which plaintiff admitted that "he was broke—was insolvent," and declared his intention to remove his property out of the State, so as to avoid his creditors; "that his plan of removal was to take his negroes and mules, and go south to Dale county, and thence westward, and dispose of his negroes; while witness was to loan him two mules, to carry his family to the cars at Opelika, to go eastward;" that witness and plaintiff, during these two or three weeks, "were engaged in a trade, which was consummated a day or two before said 21st March, 1860, and by which plaintiff sold out to witness all his stock, corn, fodder, and meat, at a low down price; that the price agreed on was five hundred dollars, payable on the 1st January, 1861, and the trade was consummated by two notes,—one for two hundred dollars, received by Lockhart himself, and the other for three hundred dollars, received by B. H. Baker, in his presence, and by his direction, in part payment of a negro [under a contract] then and there consummated between said Baker and plaintiff;" also, that he had communicated to Baker the substance of his conversations with plaintiff, and Baker had communicated the same to Philips & Weems, who were attorneys for the plaintiff in attachment. "The defendants asked said witness, what plaintiff had told him, in said conversations, in reference to his pecuniary circumstances; in reply to which, the witness made the statement above mentioned, 'that he said he was involved and broke.' The plaintiff objected to said question, and also to the answer thereto, and excepted to the overruling of his objections by the court."

"To show that he had acted without malice, defendants' counsel offered in evidence three other attachments against said Lockhart, amounting to nearly five hundred dollars in

debts, which were dated and sworn to on the 20th March, 1860, and of which Philips & Weems, attorneys for said Wood, and sureties on the bond on which this suit was founded, had notice. The plaintiff objected to the admission of said attachments as evidence, and excepted to the overruling of his objection. The defendants then offered record evidence of three other attachments against said Lockhart, issued on the 21st March, 1860, to prove indebtedness by said Lockhart, to the extent of seven hundred dollars additional; to which the plaintiff objected, and excepted to the overruling of said objections by the court."

The witness Harris further testified, "that he received a letter from Mrs. Lockhart, a day or two after said attachments were sued out, requesting him to sell her a sow and pigs, which he had purchased from said Lockhart in the trade above spoken of; that in his answer he had referred to said Lockhart, and denied that he had ever told Baker about his intention to run away; but this, he said, was done from sympathy for her distress, and was false. The defendants offered in evidence the said letter from Mrs. Lockhart, and the court admitted it, against the plaintiff's objection; to which ruling of the court, also, the plaintiff excepted."

"The plaintiff offered in evidence the tax-assessor's books of Russell county, to show that the amount of property assessed against him in 1859 and 1860 was about fifteen thousand dollars. The court excluded this evidence, on the defendants' objection, and the plaintiff excepted. The plaintiff offered in evidence, also, his medical books of accounts, connected with proof of their having been correctly kept, to show that the amount of good debts therein charged, up to March, 1860, exceeded his liabilities. The defendants objected to this evidence also, and the court sustained their objection; to which the plaintiff excepted."

"The above being the substance of all the evidence in the case, the plaintiff's counsel thereupon asked the court to charge the jury, that if they believed, from the evidence,

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that no demand in favor of said Thos. G. Wood against said Lockhart existed at the time said attachment was sued out, then they must find in favor of the plaintiff in this action. The court refused to give this charge, and the plaintiff excepted to its refusal."

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

G. D. & G. W. HOOPER, for appellant.

PHILIPS & WEEMS, *contra*.

A. J. WALKER, C. J.—In an action, the gravamen of which is the wrongful and malicious suing out of an attachment, the defense may be rested upon the existence of any one of the several grounds for the procurement of such process.—*Kirksey v. Jones*, 7 Ala. 622. The attachment which gave rise to this suit, was sued out upon the ground that the defendant in attachment was about to remove his property out of the State, so that the plaintiff would probably lose his debt, or have to sue for it in another State. Nevertheless, it was a matter provable in the defense of this action, that the defendant in attachment had fraudulently disposed of his property, or was about to fraudulently dispose of his property; for they are also grounds upon which an attachment may be obtained.

[2.] Evidence was produced on the trial of a sale which had been for some time under negotiation by the defendant in attachment, of a portion of his property before the issue of the attachment, at what the witness denominated "a low down price." There was, also, evidence conducing to show an intention to dispose of his slaves. The plaintiff excepted to the ruling of the court below admitting the further evidence that the defendant in attachment, not long before the attachment issued, admitted "that he was involved," and "that he was broke." This evidence was clearly pertinent to the question of the *bona fides* of the conveyance made, as well as of that which was contemplated. The defendant had a right to show a fraudulent

intent, as connected with the conveyance made and that contemplated, in support of the proposition, that the plaintiff had conveyed his property fraudulently, or was about to do so. The evidence above stated was, therefore, in the attitude in which the defense was presented in the court below, admissible. It was so ruled by this court, upon a similar question, in *Yarbrough v. Hudson*, 19 Ala. 653. It must, however, be understood, that neither indebtedness, pecuniary embarrassment, nor insolvency, is a ground for the obtainment of an attachment; and that neither can justify the wrongful suing out of an attachment, or mitigate the offense of malice in obtaining it. The pecuniary condition of the defendant is only admissible in evidence, when it contributes to support some proposition which becomes material on the trial.—*Floyd v. Hamilton*, 33 Ala. 235; *Jones v. Lawrence*, 36 Ala. 18.

[3.] It would be competent for the plaintiff to meet the defendants' evidence, as to his embarrassed pecuniary condition, by proof of subsisting accounts due to him as a physician; but such testimony could not be received, without evidence that they were just. We have some doubts as to the effect of the statement in the bill of exceptions, that the books of the plaintiff were correctly kept; and we therefore do not decide, whether the court erred in excluding the plaintiff's medical books upon the proof made. The tax-assessor's books were not competent evidence for the plaintiff.

[4.] The court committed no error, in admitting in evidence the attachments issued one day before the attachment in this case, in connection with evidence that notice thereof was had, before suing out the process, by two of the defendants, one of whom, as attorney, procured the attachment. Such evidence is admissible upon the question of malice. It is so decided in *Yarbrough v. Hudson*, 19 Ala. 653. But the attachment offered without proof of notice to the defendants, and the letter of Mrs. Lockhart, were clearly inadmissible.

[5.] The first charge asked by the plaintiff ought to

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have been given. If there was no debt, the attachment was wrongfully issued.—*Spivey v. McGhee*, 21 Ala. 417 ; *Seay v. Greenwood*, *ib.* 419 ; *Sharpe v. Hunter*, 16 Ala. 765 ; *Marshall v. Betner*, *ib.* 833 ; *Jones v. Kirksey*, 10 Ala. 839 ; *Sackett v. McCord*, 23 Ala. 851 ; *Zeigler v. Hall & David*, 23 Ala. 127 ; *Garrett v. Logan*, 19 Ala. 344. If the attachment was wrongfully sued out, there was a breach of the condition of the bond ; and the plaintiff had a right to recover nominal damages, if there was no actual damage.—*Garnett v. Yoe*, 17 Ala. 74 ; Sedgwick on the Measure of Damages, chap. 2. But he was entitled to recover any actual damage he may have proved. The charge asked could only be proper, where the evidence was such as to leave no room for controversy as to the right of recovery, if the jury were convinced by the evidence that there was no debt. Such was the case here. There was no evidence tending, in the slightest degree, to oppose the plaintiff's right to recover nominal damages, or the actual damages proved, if there was no debt. It was, therefore, the duty of the court, without hypothesis, to have instructed the jury that the plaintiff was entitled to recover, if there was no debt upon which the attachment could issue.

Reversed and remanded.

MARTIN vs. WHARTON.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF LAND.]

1. *When misrepresentation constitutes fraud.*—A statement by the vendor, made pending the negotiations between him and the purchaser, to the effect that his wife, if she survived him, would only be entitled to dower in the lands of which he died seized and possessed, and not in lands sold and conveyed by him during the coverture, is a misrepresentation as to a matter of law, and does not constitute a fraud.
2. *Statute of frauds, as to contracts required to be in writing ; averment of.* In pleading or declaring on a contract which is required to be in writing, (Code, § 1551,) it is not necessary to aver that it was reduced to writing.

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3. *Same ; contract for sale of land, &c.*—A promise by the vendor, made pending the negotiations between him and the purchaser, to procure a relinquishment of his wife's right to dower in the lands, is within the statute of frauds (Code, § 1551).
4. *Set-off for damages available at law, in action for purchase-money.*—Under section 2440 of the Code, a cross demand, growing out of a defect in the vendor's title, is available as a set-off in an action on the notes for the purchase-money, although the purchaser is in possession of the lands ; but, before the Code was adopted, the law was otherwise.
5. *Inchoate right of dower not available as set-off.*—An inchoate right of dower cannot be measured accurately by any pecuniary standard ; consequently, damages for the breach of a promise to procure a relinquishment of such right, or to indemnify against it by bond with surety, is not available as a set-off to the purchaser, (Code, § 2240,) in an action on the notes given for the purchase-money of the lands.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. S. D. HALE.

THIS action was brought by Jacob Wharton, against Jesse Martin ; was founded on the defendant's promissory note, under seal, for three hundred dollars, dated the 10th November, 1856, and payable on the 25th December, 1857 ; and was commenced on the 25th February, 1858. The defendant filed three special pleas,—the last of which averred a failure of consideration ; and the others were in the following words :

“1. For answer to the complaint, defendant says, that the note sued on was given in part payment of a tract of land, bought by defendant from plaintiff ; that defendant, while negotiating with plaintiff for said land, refused to pay the price asked by plaintiff, because he supposed that plaintiff's wife, then and now living, upon the death of plaintiff before her, would be entitled by law to a dower interest in said land ; that plaintiff averred that such was not the case—that his wife would, in no event, be entitled to dower in the land sold by him in his life-time, but would only be entitled to dower in the lands owned and possessed by him at the time of his death ; and he assured defendant that if he would buy the land, they would get information as to the law of the case, and, if it was true that his wife, if living at his death, would be entitled to dower in said

land, he would procure a relinquishment of dower to said land from his wife, and deliver it to defendant, or would give defendant bond, with good and sufficient sureties, to indemnify him against all loss or damage on account of her said right to dower. And defendant says, that thereupon, in consideration of plaintiff's said promises, as well as in consideration of said land, defendant executed said note to plaintiff, and received from plaintiff his absolute deed of conveyance to said land, with covenants of warranty, and went into possession of said land ; that afterwards, being advised that the law as to dower was not and is not as represented by plaintiff, defendant demanded of plaintiff the relinquishment of dower by his wife, or his bond with surety against said dower claim, according to his agreement ; but plaintiff failed and refused to give defendant either the relinquishment or the bond. And defendant avers, that a relinquishment of said dower interest cannot be procured from plaintiff's wife for less than two hundred and fifty dollars ; that said land is of less value, by the said sum of two hundred and fifty dollars, by reason of the incumbrance of said claim of dower ; and that he is in fact damaged to the extent of two hundred and fifty dollars ; and he asks that he be allowed said sum of two hundred and fifty dollars, by way of set-off against the note sued on, on account of said incumbrance and plaintiff's breach of his said promise."

"2. And for a further answer to said complaint, defendant says, that the execution of the note sued on was procured by the false and fraudulent representations of plaintiff, in this: that by law the land, for part of the purchase-money of which said note was given, would not, in the event of the death of plaintiff before his wife, then and now living, be subject to a claim of dower by plaintiff's widow ; that the widow of a deceased husband was not, by the laws of Alabama, entitled to dower in any lands, except those in possession of which the husband died, and not to the lands sold and conveyed by him in his life-time. And defendant says, that, confiding in said representations

of the law, he was induced to execute said note; and he avers, that plaintiff then had, and now has, a wife who, if living at the death of plaintiff, will be entitled to a dower interest in said lands; and that the value of said lands is greatly lessened by reason of said incumbrance, and he is damaged to the extent of two hundred and fifty dollars, which he asks to set off against plaintiff's demand."

The plaintiff demurred to each of these pleas, and assigned the following as grounds of demurrer to each: "1st, that defendant, having received an absolute deed, with warranty of title and against incumbrances, and having gone into possession of the land, cannot defend in this court, under the contract for indemnity against the wife's dower; 2d, that a mistake, or misstatement, as to a matter of law, is no fraud, where the opportunities of the parties to know the law are equal; and, 3d, that a parol contract for the sale of lands, or a parol promise to indemnify against incumbrances, is void at law, unless reduced to writing, and signed by the promisor, or by some one by him authorized, and, if any such promise was made and in writing, it should be so averred in the plea." The court sustained the demurrer to both pleas, and issue was then joined on the third plea. On the trial, as the bill of exceptions shows, the plaintiff having read in evidence the note on which the suit was founded, the defendant offered proof of the facts alleged in the special pleas above copied; which evidence the court excluded, and the defendant excepted to its rejection.

The rulings of the court on the pleadings and evidence, adverse to the defendant, are now assigned as error.

M. J. TURNLEY, for appellant.

THOS. B. COOPER, *contra*.

STONE, J.—[1.] The second plea in this cause complains only of a misrepresentation of a matter of law,—a question alike open to both parties; and the demurrer to it was rightly sustained.—*Townsend v. Cowles*, 31 Ala. 428-35.

[2-3.] The first plea claims a set-off by reason of an alleged incumbrance on the vendor's title; the incumbrance being an inchoate right of dower in the premises, existing and unrelinquished in the vendor's wife. The averment of the plea is, that the vendor, as part consideration of the note sued on, agreed to procure the relinquishment of his wife's dower, or, failing in that, to give the purchaser bond, with surety, to indemnify him against all damage and loss on account of her said right to dower in said land. It is objected to this plea, that the promise to obtain a relinquishment of the vendor's wife's right to dower, is void under the statute of frauds. It is not necessary that a promise, such as this, shall, in the declaration or plea, be averred to be in writing; that question arises on the proof.—Browne on the Statute of Frauds, § 505; 1 Chit. Pl. 480; *Rigby v. Norwood*, 34 Ala. 129. But, as this same question arose on an offer of testimony, it is proper for us to say, that the vendor's promise to procure a relinquishment of his wife's right to dower in the lands was void under the statute of frauds, unless in writing, &c., as required by section 1551 of the Code.—See Browne on Stat. Frauds, §§ 232, *et seq.*; *Chiles v. Woodson*, 2 Bibb, (Ky.) 71; *Campbell v. Taul*, 3 Yerg. 548, 557.

[4.] A second objection to this plea is, that a set-off growing out of a defect in the vendor's title, the purchaser being in possession, can not be maintained against a suit for the purchase-money. Such was the law before the Code.—See authorities collected in *Kelly v. Allen*, 34 Ala. 668. The Code, however, changed the rule, and allows this defense to be made to a suit on the note.—*Holly v. Younge*, 27 Ala. 203; *Gibson v. Marquis*, 29 Ala. 672-3.

[5.] The promise, then, for a breach of which damages are claimed, was to procure a relinquishment of the right of dower existing in the vendor's wife, or to give the purchaser indemnity against that incumbrance, in form of a bond with surety. Each of these alternative promises looks to appellant's security against the inchoate, contingent right of dower, which Mrs. Wharton may have in the

lands. The value of this inchoate interest is the measure of the incumbrance, and, as a corollary, must define the measure of the defendant's damages for a breach of the promise. What is the value of her dower interest? Can it be ascertained? It must, in the nature of things, depend, first, on the contingency whether Mrs. Wharton survive her husband. If she does not, her dower right can never mature, and can never disturb appellant in his possession. In cases of dower rights, perfected by the death of the husband, leaving a wife surviving, we have uniformly held, that no absolute money valuation can be fixed upon them, by reason of the uncertain duration of the life of the dowress.—See the forcible remarks of Justice Ormond on this subject, in the leading case of *Beavers v. Smith*, 11 Ala. 33. To the same effect, see, also, *Johnson v. Elliott*, 12 Ala. 114; *Potier v. Barclay*, 15 Ala. 448; *Fry v. Merchants' Ins. Co.*, *ib.* 815; *Parks v. Brooks*, 16 Ala. 329; *Springle v. Shields*, 17 Ala. 298; *McLemore v. Mabson*, 20 Ala. 139; *Thrasher v. Pinckard*, 23 Ala. 620; 7 Cranch, 580.

In the case of *Holley v. Younge*, (27 Ala. 206,) this court allowed the defense of set-off to be made, although the foundation of the set-off sounded in damages. The language of the court, in that case, is, "A demand, not soundings in damages merely, is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard."

In this case, after all the existent facts are established, the damages cannot be correctly measured by any pecuniary standard. No human skill can foretell, or conjecture, the probable duration of either Mr. or Mrs. Wharton's life. This, *certainly* in the absence of organic disease, would be a subject on which the most skillful expert would not be allowed to give his opinion in evidence. There being no standard by which to measure the appellant's damages resulting from the alleged breach of the vendor's promise, we hold, that the first plea was defective, and the demurrer to it rightly sustained. Whether the appellant is entitled to any other relief, we do not decide.

Affirmed.

PEARSON *vs.* SEAY.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT.]

1. *Difference between mortgage and conditional sale.*—A conveyance, in the usual form of a deed of bargain and sale, which recited as its consideration the present payment of \$600 by the grantee (P.) to the grantor (M.), and contained the usual covenants of warranty, with a stipulation added in these words: "Now it is agreed between the parties, and is hereby made a part of the above obligation, that if the said M. pay, or cause to be paid unto the said P., on or before the 1st day of January next, the sum of \$600, which amount the said P. this day paid to him in consideration of the above purchase, then this obligation to be void, else to remain in full force and effect,"—*held* a mortgage, and not a conditional sale, on proof that it was executed for the purpose of indemnifying the grantee against liability on certain notes executed by him for the accommodation of the grantor, to be discounted by a third person for the benefit of the grantor, and amounting in the aggregate to the sum specified as the consideration of the deed.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 7th October, 1857, by Benjamin F. Pearson, against John W. Seay, Francis M. Mosely, and Mary Ann Mosely, his wife; and on the death of said Seay pending the suit, the same was revived against his personal representatives. The object of the bill was, to obtain the rescission of a contract, by which the complainant, as he alleged, purchased a tract of land from said F. M. Mosely, and executed to him several notes, amounting in the aggregate to six hundred dollars; and he also asked the cancellation of the notes, an injunction of an action at law which had been brought against him on them, and general relief. The ground on which a rescission of the contract was sought, as alleged in the bill, was, that Mosely, at the time the contract was made, falsely and fraudulently represented that he had a perfect title to the lands, and that his wife would readily relinquish her

dower ; whereas, in fact, he had no title whatever, and the land belonged to his wife's children by a former husband. The deed from Mosely to the complainant, which was made an exhibit to the bill, recited as its consideration the present payment of six hundred dollars by Pearson to Mosely, was in the usual form of a deed of bargain and sale, and contained the usual covenants of warranty ; and a stipulation was added at the bottom, in the following words : "Now it is agreed between the parties, and is hereby made a part of the above obligation, that if the said Mosely pay, or cause to be paid, unto the said Pearson, on or before the first day of January, 1857, the sum of six hundred dollars, which amount the said Pearson this day paid him in consideration of the above purchase, then this obligation to be void ; else, to remain in full force and effect." The chancellor (Hon. WADE KEYES) dismissed the bill, on motion, for want of equity ; but his decree was reversed by this court, at its January term, 1860, and the cause was remanded ; the court holding, that the transaction between the complainant and Mosely, as shown by the allegation of the bill and the exhibit, was a conditional sale, and not a mortgage.—See the case reported in 35 Ala. 612-17, where the allegations are copied *verbatim*.

An answer was filed by Mosely and wife, admitting all the allegations of the bill, except as to any fraud on the part of Mosely in making the contract with Pearson ; and alleging that, at the time the contract was entered into, he honestly believed that he and his wife had a perfect title to the land. The executors of the last will and testament of Seay filed an answer, alleging that the deed from Mosely to Pearson was in fact a mortgage, and was so intended by the parties at the time it was made ; that no money was paid by Pearson, but several promissory notes were executed by him, payable to Mosely, and amounting in the aggregate to six hundred dollars ; that these notes were executed by Pearson for the accommodation of Mosely, and with the intention that they should be discounted for his benefit ; that they were discounted at the time by Seay, on the rep-

representations of Pearson and Mosely, and the money was advanced on them to Mosely; and that the deed from Mosely to Pearson was intended merely as a mortgage to secure Pearson against his liability on the notes.

The deposition of Mosely was taken under an order of court. The material parts of his testimony are the following: "Seay was present when I made the sale of the land to Pearson. The understanding was, that he was to *shave* the notes given in consideration of the land; and he did *shave* them on the spot. There was no conversation between him and Pearson, in my presence, about the payment of the notes. He received the notes immediately on their execution by Pearson." "The sale was considered incomplete until the assignment of my wife's dower, and Seay was a witness to that fact. I was not indebted to Pearson at the time of the transaction. The notes were made for the purpose of negotiation with Seay, and to raise money on the same. The deed that I gave Pearson was to indemnify him for the use of his name, to enable me to raise money; it was for no other object than his security. Pearson expected to hold the land, provided I did not pay back the money. I retained possession of the land. Pearson demanded possession, but never took it. He merely took titles from me to secure him from liability on the notes I traded to Seay." "The notes were made with the view of my trading them to Seay. Pearson made them with that expectation, and himself went after Seay, to buy the notes and draw the writings; and he told Seay, that the notes were good, and to trade for them." "Pearson refused to stand my security without a sale of the land. I was at liberty to use the notes as I wished. It was optional with Pearson, so far as I was concerned, whether he retained the land or not. It was not a fair valuation of the land. The right was reserved to me to take back the land, if I paid the notes."

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

JEFF. BUFORD, *contra*.

A. J. WALKER, C. J.—The only question presented on the former appeal in this case, was, whether the complainant's bill contained equity. It was then decided, that the facts alleged in the bill evidenced a sale of land to the complainant in consideration of his notes, subject to a right to re-purchase in the vendor; and that the complainant was entitled to relief against the holder of the notes for the purchase-money, on account of the fraud in the sale. The material facts upon which our decision was predicated, were, that the complainant executed his notes for six hundred dollars; that the notes were assigned for the purpose of raising money, and that the deed to complainant contained a stipulation, that it should be void upon the payment at a specified day, by the grantor to the grantee, of six hundred dollars. We rested our decision upon the absence of any obligation on the grantor to pay the notes, or protect his grantee against their payment, and on the anomaly which would be presented, by assuming that the grantor and grantee became reciprocal debtors to each other, in the sum of six hundred dollars, and that the grantor secured the payment of his debt by mortgage.

The case is now before us upon appeal from a decree upon the case made by the proof and pleadings. The evidence shows, that the notes of the complainant were executed for the accommodation of the payee, to be discounted by the defendant Seay, for the payee; and that the land was conveyed for the purpose of securing and indemnifying the complainant against the notes executed for the accommodation of the payee. It thus appears that the maker of the deed was under an obligation to protect the complainant against his notes, and that the deed was designed merely to operate as a security to him against the payment of the notes. The two points upon which our former decision was placed, are thus met, and obviated. Under the proof, the grantor was under an obligation, the

performance of which might be secured ; the deed was intended to afford the security ; and the anomaly mentioned does not exist ; for there is only a debt by the complainant, and an obligation upon the grantor in the deed to protect him against it. It is plain that the transaction, as explained by the proof, is a mortgage. In support of this proposition, we refer to the cases cited in *Pearson v. Seay*, 35 Ala. 612.

The misrepresentation of the mortgagor, as to the title to land mortgaged for the indemnity of the mortgagee, can afford no ground for equitable relief against the holder of the note given by the mortgagee to enable the mortgagor to raise money.

Affirmed.

BEENE'S ADM'R vs. COLLENBERGER & CO.

[SETTLEMENT OF INSOLVENT ESTATE—CONTEST AMONG CREDITORS.]

1. *Verification of claim, sufficiency of.*—An affidavit, made by an agent, who states that "he knows the within claim is just, true, and unpaid," is a sufficient verification of a claim against an insolvent estate (Code, § 1847) ; but, if the affidavit describes the claim as "charged against the estate of *Jesse B. deceased*," instead of *Benjamin Y. B.*, it will not support a decree allowing the claim.
2. *Unauthorized sale of personalty by administrator.*—A sale of personal property by an administrator, without an order of court, or under an order which is void for want of jurisdiction in the court, is absolutely void, and will not support an action against the purchaser to recover the agreed price.
3. *When action lies to recover money paid by mistake.*—The purchaser of personal property, at a public sale made by an administrator under a void order of court, is chargeable with notice of the administrator's want of authority, and cannot maintain an action against him to recover back the purchase-money, after the property has been recovered by a succeeding administrator *de bonis non*.

APPEAL from the Probate Court of Dallas.

IN the matter of the estate of Benjamin Y. Beene, deceased, which was declared insolvent on the 12th April, 1858, and against which a claim was filed by the appellees on the 3d July, 1858. The appellees' claim set out a bill of sale for two slaves, which was signed "Benjamin Y. Beene, adm'r," and in the following words: "Received, Selma, July 7, 1855, of A. Collenberger & Co. seven hundred and eighty-five dollars, in payment for the slaves Sylvia and Henrietta; which said slaves were sold as under an order issued from the probate court of Dallas county on the 30th June, 1855, and purchased by the said Collenberger & Co., as the property of Ellen Chapman. The said slaves I warrant, as administrator, to be sound." Beneath this bill of sale was made out an account against the estate of Beene, in favor of Collenberger & Co., consisting of the following items: "July 7, 1855. To amount of above bill of sale, (the title to said slaves being now contested, on the ground that said Beene had no right to sell them under any order of probate court,) \$785;" "interest on above, to day of allowance;" and, "cost of litigated title to said slaves." The original affidavit, verifying the claim, was made by one Dublon, before a justice of the peace, on the 2d July, 1858, and stated, "that he believes the above demand to be just and correct, and that the same is unpaid;" but an amended affidavit was made by one E. Ikelheimer, on the 3d May, 1860, stating that "he knows the within claim is just, true, and unpaid, as charged against the estate of Jesse Beene, deceased."

On the 28th March, 1859, the administrator filed the following written objections to the allowance of this claim: "1st, because the affidavit states only the belief of an agent, and because the affidavit is insufficient; 2d, because said claim is not a proper charge against said estate;" and, 3d, "to the claim for costs, because no amount is stated, and it is not sworn to as required by law." On the trial, also, the administrator moved to reject the claim, "on the ground that the affidavits filed in support of it were insufficient," and reserved an exception to the overruling of his objection.

The claimants proved, that the slaves were sold by said Beene, as the administrator of Ellen Chapman, deceased, at public outcry, and were bought by one Ikelheimer, as their agent, who received the bill of sale for them, and afterwards paid the note given for the purchase-money, which was \$785; and that the slaves were afterwards recovered from said Ikelheimer, who held under them (claimants), by Evans & Portis, as administrators *de bonis non* of Ellen Chapman. They also offered in evidence the record of the suit brought by Evans & Portis against Ikelheimer, and the records of the probate court relating to Beene's administration on Ellen Chapman's estate; all of which are set out in the report of the case (*Ikelheimer v. Chapman's Adm'rs*) in 32 Ala. 676-702. The order of sale, under which the slaves were sold by Beene, was held void by this court; and the recovery against Ikelheimer was based on the invalidity of the order.

On the evidence above stated, the court allowed the appellees' claim; to which the administrator excepted, and which he now assigns as error, together with the overruling of his motion to reject the claim on account of the insufficiency of the verification.

WHITE & PORTIS, for appellant.

BYRD & MORGAN, *contra*.

STONE, J.—The decree in this case must be reversed, for a defect in the amended affidavit of verification. The amended affidavit is sufficient, if it had established the claim against the proper estate. It proves the claim against the estate of Jesse Beene, deceased, instead of Benjamin Y. Beene. This may be a clerical error, but we find it carried into both the original and amended records.

Here this opinion might close; but we feel it our duty to pass on the merits of the controversy.

[2.] The following propositions are conclusively settled by the former adjudications of this court. *First*: The sale of Mr. Beene, the administrator in chief, was abso-

lutely void.—*Pistole v. Street*, 5 Porter, 64; *Weir v. Davis*, 4 Ala. 442; *Dearman v. Dearman*, *ib.* 526; *Fambro v. Gantt*, 12 Ala. 298; *Lay v. Lawson*, 23 Ala. 390; *Wyatt v. Rambo*, 29 Ala. 519; *Hall v. Chapman*, 34 Ala. 553; *Ikelheimer v. Chapman*, 32 Ala. 676. *Second*: Mr. Beene could not have maintained an action on the contract of sale to Collenberger & Co. The sale being contrary to law, would not support an action.—*Fambro v. Gantt*, 12 Ala. 298; *Pettit v. Pettit*, 32 Ala. 288.

[3.] From the two propositions stated above it results, that Messrs. Collenberger & Co. were under no legal obligation to pay Mr. Beene the money bid at the sale; and hence, the payment by them must be pronounced voluntary. Buying, as they did, at an administrator's sale, the law charges them with notice of his want of authority. Money voluntarily paid, under circumstances like the present, can not be recovered back. If there was any mistake, it was a mistake of law, and not of fact.—*Town Council v. Burnett*, 34 Ala. 400, and authorities cited.

We deeply lament the result we are compelled to arrive at in this case. It works a most palpable injustice, from which we would gladly relieve the purchasers at the void sale. We have struggled to find some argument, by which we could arrive at a different result, but have found none. The decisions of this court have left the law arising on questions growing out of void sales by administrators, in a deplorable state of confusion and hardship. This we could not relieve, without boldly disregarding and overruling principles which have long been considered as settled. The evils consequent upon a change of decision, might, and probably would, be greater than will result from an adherence to former adjudications. Another co-ordinate branch of the government can apply the corrective, without disturbing titles and possessions which now rest in confident security.

This opinion has been prepared near two years. We have held it up, in the hope that we might find some solution of the question more accordant with our wishes. Our

hopes have not been realized, and we now announce the foregoing as our deliberate judgment.

Reversed and remanded.

POTIER'S EXECUTORS *vs.* BURDEN.

[BILL IN EQUITY TO RESTRAIN DIVERSION OF WATER FROM STREAM.]

1. *When equity will restrain diversion or obstruction of water.*—A riparian proprietor cannot maintain a bill in equity, to restrain a diversion of water from the stream, when it appears that there was a natural outlet from the stream from time immemorial, and that the defendant's ditches only draw into a narrower channel, and give a directer course to the water flowing through this natural channel, without materially increasing the quantity which escapes from the main stream; nor on account of a past obstruction of the stream, which has been removed, and the continued repetition of which is not threatened.
2. *Conclusiveness of judgment.*—A judgment at law in favor of the plaintiff in an action by a riparian proprietor to recover damages for an unauthorized diversion of water from the stream, is not conclusive evidence in his favor, in a chancery suit instituted by him against the defendant to restrain a diversion of the water, unless the identity of the cause of action in the two suits is shown.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. M. J. SAFFOLD.

THE bill in this case was filed, on the 18th December, 1850, by John Burden, against Lewis Potier and others, and sought to restrain a diversion of the water of a stream known as Three-mile creek, which flowed through the complainant's lands, and on which he had erected a mill. Potier, who was the principal defendant, died after filing an answer; and the suit was revived against his executors. The material facts of the case, showing the legal questions involved, will be readily understood from the opinion of the court. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; and his decree is now assigned as error.

MANNING & WALKER, for appellants.

K. B. SEWALL, *contra*.

A. J. WALKER, C. J.—Three-mile creek makes a bend north of the line of its general course. In making this bend, the creek forms a figure which may be described correctly enough for present purposes, as the arc of a circle. There was a stream of water, somewhat in the position of a subtending chord, flowing out of the creek at the upper end of the arc, and returning at its lower end. Upon this stream there are two mills; one known as "Page's mill," or the "Paper mill," and the other as "Potier's mill." The former stands above the latter upon this stream. The complainant has a mill upon the main creek, between the points of departure and return of this stream. Not long before the commencement of this suit, Potier dug a ditch running in a north-western direction, extending from a point on this stream above the two mills, and tapping the creek a short distance below the point at which the stream left it. The diversion of water from the creek by the means above described, lessens the motive power of the complainant's mill, and, as he contends, is to him a nuisance redressible by a chancery decree. On the part of the defendant, it is said that, from time immemorial, the water has been accustomed to flow from the creek above the bend, and return to it below, forming an island; and that the artificial drains merely serve to draw the water into a narrower channel, and give it a directer course, without any material increase of the quantity escaping from the creek. The question of fact, which thus arises, is to be decided upon a review of the testimony.

The complainant has established by his testimony, that the diversion of water from the creek is very large. It is variously estimated by his witnesses, at from one-fourth, to one-half; and it is certainly shown to be extremely detrimental to his interest. These facts, however, do not control the decision of the material question, whether there is a diversion from natural causes, which has existed from

time immemorial, and has not been materially increased by artificial agency. We have carefully examined and considered the testimony on both sides touching this question. The depositions of the complainant's witnesses, Holt, Demarest, Philips, and Lewis, standing alone, without explanation or contradiction, would show that there was no material diversion of water from the creek, until it was produced by artificial channels tapping the creek. On the other hand, the testimony of the defendant's witnesses, Moore, Cooper, Anderson, Eslava, Williams, Wilson, Newbold, Wheeler, Gager, Rodgers, Collins, and Juzan, some of whom knew the locality within the first decade of the present century, convince us that, as far back as the subject can probably now be traced, there was a natural channel, not very greatly differing in location from the present channel, and conducting a quantity of water, which has probably been increased by artificial means only in so far as the collecting of it into a narrow channel would produce an increase. At least, we cannot decide that the quantity of water withdrawn from the creek above complainant's mill has been increased by the artificial channel.

The natural channel was so well defined, as to cause the space intervening between it and the creek to be characterised as an island. It was probably first formed, at a period beyond the memory of the witnesses, in consequence of the breaking over the bank by the superabundant water in overflows. This is an idea suggested to us by the testimony of Moore, whose knowledge of the locality extends back through a period of forty-six or seven years. The first artificial channel, extending in the direction of the chord which subtends the curve of the creek, was cut by one Page. The evidence, although it is conflicting, leads us to the conclusion, that this ditch did not tap the creek, but extended to a pond, formed in the neighborhood of it by water flowing over the bank. If the ditch did not tap the creek, it was not probably the cause of any increased withdrawal of water. By the water collected in this ditch, the mills of Page and Potier were propelled.

Subsequently, Potier cut a ditch, diverging from the one cut by Page, reaching the creek lower down, and bringing the water directly from the creek. We infer from the diagram, that this ditch was dug in consequence of an interference with the accustomed flow from the creek by Stein's ditch, which was cut for the purpose of returning to the creek water taken out above by him for the benefit of certain water-works. It appears from the diagrams exhibited, that Stein's ditch passes directly across the stream, which run in the direction of Page's and Potier's mills; and, we infer, it would interfere with the accustomed flow of that stream. From this fact we argue a sufficient motive for the cutting by Potier of the ditch which tapped the creek. We find nothing which authorizes the conclusion, that Potier cut it with the design of enlarging the quantity of water withdrawn from the creek, or that it did really have that effect.

We cannot incorporate in this opinion the large mass of testimony upon which our conclusion is based; still less can we find space to comment upon it. A reference to it, as found in the depositions of the witnesses above named, will, we think, sufficiently sustain our decision upon the question of fact above stated.

From the proposition, that Potier's ditch takes from the creek no more water than was accustomed from time immemorial to be withdrawn in the natural channel, it necessarily follows, that the complainant has not been deprived of any water accustomed to flow naturally to his mill. His right, as a riparian proprietor, is to the stream as it was wont to run. *Aqua currit, et debet currere, ut currere solebat.* 3 Kent's Com., m. p. 439; *Stein v. Burden*, 29 Ala. 127. The complainant has the undisturbed enjoyment of the stream adjacent to his land, as it was wont to run; and upon the facts, as proved by the witnesses, we must decide that he is without any just ground of complaint.

If Potier did obstruct the creek below his ditch, the obstruction was not a permanent injury; but we infer from the testimony that the obstruction has been removed, and

has not been restored. For the injury produced by the obstruction, the remedy is at law, and not in chancery. Past injuries are no ground for equitable interference. Where the injuries are continued, or the right to continue them set up and persisted in, chancery interposes for the protection of a riparian proprietor.—Angell on Water-Courses, 513, § 444.

[2.] It is contended for the complainant, that a recovery at law has been obtained by him against the defendant, since the commencement of this suit, for the same diversion of water alleged in the bill; and that that recovery, standing unreversed, is conclusive evidence in support of his allegation. The only evidence upon the subject is the record, which does not show the identity of the grievance in the suit at law with that alleged in this case. This is a sufficient answer to the position assumed, and we decline to decide farther.

Reversed and remanded.

ALLINGTON vs. TUCKER.

[PETITION FOR REHEARING, AFTER FINAL JUDGMENT, ON GROUND OF ACCIDENT OR SURPRISE.]

1. *What constitutes accident or surprise.*—A defendant in a judgment at law can not obtain a rehearing under the statute, (Code, § 2408,) because he had forgotten, at the trial, that he had previously made a tender, which was refused, and which was less than the amount of the verdict in favor of the plaintiff; nor because an important witness, who was not subpoenaed, “moved and travelled about a great deal, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony.”

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. WM. S. MUDD.

THE appellee in this case obtained a judgment against the appellant, on the 16th April, 1857, for \$32 50. The

judgment was founded on a note for \$80, which was given for the price of a horse; and was rendered on the verdict of a jury. On the 21st July, 1857, the appellant filed his petition for a rehearing in the case, alleging the following facts as grounds of relief: "The court instructed the jury, on the trial, that although they might believe there had been a breach of the warranty, and that the horse was unsound at the time of the sale; yet, if they believed that the horse was of any value at all, they must find for the plaintiff to that amount, unless the defendant had returned or offered to return the horse to Tucker, or had tendered to said Tucker the actual value of the horse before suit brought. Petitioner states, that he failed to prove on the trial either a return of the horse, or an offer to return him, or a tender of any amount before suit brought; and that he had entirely forgotten the fact, that he had, through his attorneys, before the commencement of the suit, made a tender in writing of twenty dollars, which was more than the actual value of the horse, and was only intended to buy his peace. Petitioner had entirely forgotten the fact at that time, and the circumstances were only brought to his mind by the accidental discovery, since the trial, of a paper which had been long lost," &c. "Petitioner further states, that on another trial he can prove, by one C. W. Mitchell, who resides in Texas, that petitioner wrote said letter to Tucker, shortly after the purchase of said horse, stating that the horse was unsound, and offering to return him to said Tucker. Said Mitchell moved and travelled about a great deal before said trial, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony; but petitioner has learned, since said trial, where said Mitchell resides, and is confident that he can procure his testimony on another trial." The court sustained a demurrer to the petition, and its ruling is now assigned as error.

WALKER & BRICKELL, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*

STONE, J.—The averments of the petition in this case do not make out a case of surprise, accident, mistake, or fraud, without fault on the part of the petitioner, for which section 2408 of the Code makes provision. No surprise or fraud is alleged; and the only accident or mistake asserted is, that the petitioner had entirely forgotten at the trial that, before suit brought, he had, through his attorneys, tendered \$20, which was refused; and that an important witness of his “moved and travelled about a great deal before said trial, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony.” As to the alleged tender, it is claimed that the petitioner made it through his attorneys; yet he asserts that he had entirely forgotten so important a feature in his defense. This is not accident, without fault on his part. Moreover, the tender was insufficient in amount, as shown by the verdict. If we were to grant a rehearing, on the ground that a witness moved and travelled about a great deal, so that it was exceedingly difficult to ascertain his whereabouts, we apprehend few verdicts would stand. The law exacts diligence from suitors; and if necessary, parties must, in the preparation of their causes, combat and overcome difficulties.—*White v. Ryan*, 31 Ala. 400; *Elliott v. Cook*, 33 Ala. 490; *Stewart v. Williams*, *ib.* 492.

Judgment affirmed.

HARDAWAY vs. SEMMES.

[BILL IN EQUITY FOR FORECLOSURE OF MORTGAGE AND INJUNCTION
OF ATTACHMENT CREDITORS.]

1. *Registration of mortgage; respective liens of mortgage and attachment.*
The statute which declares mortgages of personal property inoperative, as against creditors and purchasers without notice, until recorded, (Code, § 1291,) applies to a mortgage executed in another State, between parties who are non-residents of this State, if the property has

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a fixed *situs* here at the time; and if an attachment is levied on the property before the mortgage is left in the proper office for registration, its lien is superior to that of the mortgage.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 10th November, 1857, by Paul J. Semmes, against Robert S. Hardaway, John McKay, Ann C. Cook, and Edward T. Taylor; asking the foreclosure of a mortgage on a slave, which was executed by said Edward T. Taylor to the complainant, and an injunction against the other defendants, who had levied attachments on the slave as the property of said Taylor. The mortgage was dated the — day of September, 1856; was executed in Muscogee county, Georgia, where both Semmes and Taylor then resided; and was filed for registration, in the office of the probate judge of Russell county, Alabama, on the 11th December, 1856. The bill alleged, that the slave was in Muscogee county, Georgia, at the time the mortgage was executed, and was carried into Russell county, Alabama, some time in November, 1856; but the defendant Hardaway insisted in his answer, that the slave was in Russell county at the date of the mortgage, and so continued up to the levy of his attachment, which was on the 22d November, 1856. Hardaway demurred to the bill, for want of equity, and, in his answer, insisted on the priority of the lien of his attachment over the mortgage. Decrees *pro confesso* were entered against the other defendants. The slave was sold, by consent, under an order of court; and the proceeds of the sale were brought into court. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered the money to be paid over to him, holding the lien of his mortgage superior to that of the attachment. From this decree Hardaway appeals, and assigns the same as error.

WM. P. CHILTON, for appellant.

CLOPTON & LIGON, *contra*.

A. J. WALKER, C. J.—Mortgages of personal property are by statute inoperative “against creditors and purchasers without notice,” until they are recorded; unless the property is brought into this State subject to the incumbrance, and then four months are allowed for its registration.—Code, § 1291. If the property conveyed has a fixed *situs* within the State at the date of the conveyance, the mortgage falls within the influence of the law, although one or both of the parties may reside in another State. The language of the statute is broad enough to comprehend a mortgage of personalty within the State, the parties being non-residents, and it is not distinguishable as to the policy of its registration from mortgages between residents. There is, therefore, no reason for excepting the mortgage in this case from the operation of the statute, on account of the non-residence of the parties. The testimony clearly proves, that the slave in controversy had a fixed *situs* in this State at the date of the mortgage, and had had for some months before. The mortgage was, therefore, inoperative as to that slave against creditors and purchasers without notice, until it was registered.

The statute, in declaring a mortgage inoperative against creditors until it is registered, dates its effective existence as to them from the registration. A creditor, acquiring a lien before that time, has a claim superior to that of the mortgage, and against him the mortgage has had, in the estimation of the law, no existence. Such is not only the clear import of the law, but this court has fully settled that as the effect of a statute involving a kindred question.—*Gordon v. Mead*, 12 Ala. 247; *Wallis v. Rhea & Ross*, 10 Ala. 451; *De Vendell v. Hamilton*, 27 *ib.* 156; *Pollard v. Cocke*, 19 *ib.* 188; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 *ib.* 866; *Daniells v. Sorrelles*, 9 *ib.* 436.

The word “creditors” is not to be taken with a qualification, and understood to mean “judgment creditors.” The decision that the phrase, “*bona-fide* creditors,” occurring in the redemption statute, means judgment creditors,

is grounded upon reasoning altogether foreign to the question here. — *Thomason v. Scales*, 12 Ala. 309.

We regard the evidence as sufficiently establishing the correctness and consideration of at least one of the debts, for which the defendant attached the mortgaged slave. That debt is more than sufficient to cover the entire value of the slave, or the proceeds of his sale. It is, therefore, unnecessary to discuss the question as to the proof of any other debt.

The defendant's attachment, having been levied upon the slave before the mortgage was delivered to the probate judge in this State for registration, is entitled to a priority of satisfaction over the mortgage.

The points decided being conclusive of this case, we need not consider any of the other questions argued by counsel.

The decree of the chancellor is reversed, and a decree must be here rendered dismissing the bill; and the complainant must pay the costs, both of this court, and the court below.

BELL vs. CHAMBERS.

[STATUTORY ACTION AGAINST OWNERS OF STEAMBOAT, FOR LOSS OF SLAVE TRANSPORTED WITHOUT WRITTEN AUTHORITY.]

1. *Error without injury in admission of evidence prima facie inadmissible.* The admission of evidence which, when offered, is *prima facie* inadmissible, is cured by the subsequent introduction of the necessary preliminary proof.
2. *Examination of defendant as witness against co-defendant.*—When one of several defendants is examined as a witness against his co-defendants, (Code, § 2289,) this does not make him a general witness in the cause, nor authorize his co-defendants to cross-examine him as to any matter of defense not called out by his direct examination.
3. *Registration of ownership of steamboat.*—In an action against the owners of a steamboat, as registered under the act of February 15, 1854, (Session Acts, 1853-4, p. 50,) the defendants cannot exonerate them-

selves from liability by showing a change of ownership, unless such change of ownership has also been recorded as required by that statute.

4. *Deposition ; how taken.*—Where the commissioner certifies, that the witness, having read over the answers of another witness, “did solemnly swear that he would adopt them, but the steamboat, on which he was going up the river, left before he could subscribe them,” the deposition cannot be read in evidence.
5. *Statutory liability of owners of steamboat, for loss of slave transported without master's written authority.*—It is a complete defense to a statutory action against the owners of a steamboat, for the loss of a slave who was transported on their boat without the written authority of the master, (Code, § 1010,) that the slave “was a white man in all and every appearance, and would be so received and treated wherever he might go, without suspicion, where he was unknown, and that the defendants and their agents had no knowledge or suspicion of his being a slave.”
6. *Same ; counsel fees recoverable as part of damages.*—In such action, the plaintiff's counsel fees are recoverable as a part of the “reasonable expenses attending the prosecution of the suit.”

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by John A. Chambers, against Thomas D. Bell and others, as owners of the steamboat *J. M. Brown*, to recover damages for the loss of a slave who was transported on the defendants' said steamboat without the written authority of the plaintiff; and was commenced on the 30th July, 1860. The defendants pleaded “the general issue,” and issue was joined on that plea. On the trial, as the bill of exceptions states, “for the purpose of proving the ownership of the said steamboat, the plaintiff offered in evidence a transcript from the probate court of Mobile, filed under the act approved February 15, 1854, setting out the names of the owners at that time. This was objected to as evidence against any of the defendants except Bell, by whom the affidavit was made, on the ground that his agency or authority to make the affidavit of ownership was not proved. The objection was overruled, and the defendants excepted. The plaintiff afterwards introduced said Bell as a witness against his co-defendants, under section 2289 of the Code. This was objected to by the

other defendants, on the ground that it was not legal in this form of action, and that there was evidence against him. The court overruled the objection, and the said defendants excepted."

"The plaintiff asked said Bell, whether the defendants were in fact the owners of said boat at the time he made said affidavit; and the witness answered, that they were. Plaintiff then asked him, whether he was authorized by the other defendants to act for them, as their agent, in making said statement and affidavit; and he answered, that he was. Defendants' counsel then asked him, who were the owners of the boat at the time the mischief complained of was done. The plaintiff objected to this question, on the ground that the witness could not be examined generally by his co-defendants, as this would make him a witness for them, while the Code made him a witness only for the plaintiff. The court sustained the objection, and refused to let the witness be examined except on the point inquired of by the plaintiff—that is, as to the agency and ownership at the time the affidavit was made; to which the said defendants excepted. The said defendants proposed, also, to ask said Bell other questions, as to the value of the slave, and the liabilities of the parties; all of which the court refused to allow, on the ground above stated; to which several rulings the defendants excepted.

"The plaintiff had taken the deposition of one Moore, which was on file, and which the defendants offered to read. The plaintiff objected, on the ground that it was insufficiently taken, was not subscribed, and was not properly verified by the deponent. The objections were *overruled*, and the defendants excepted." The deposition referred to purports to set out the answers of the witness to the interrogatories and cross-interrogatories, but is not subscribed by him; and the certificate of the commissioner states, that said witness, "after having read over the answers of E. H. Baldwin, did solemnly swear that he would adopt them, but the steamboat, on which he was going up the river, left before he could subscribe them after I had written them off."

"The plaintiff offered to prove what were reasonable fees for his counsel for attending to this case, as a part of his right to recover. The defendants objected to this evidence ; the court overruled their objection, and they excepted. The plaintiff then proved the ownership of the negro, and his value ; and offered evidence tending to show that he was transported on said boat, and was lost during her passage up the river. The defendants then offered evidence tending to show, that the man alluded to as being lost from said boat, was a white man in all and every appearance, was recognized and treated as a white man, had hired himself on board as such, slept in the white apartments with the white people, and could not be taken for a slave by any one not knowing the fact. This evidence was objected to by the plaintiff, but was admitted by the court, for the purpose of showing that the person alluded to was not a negro, and could not be a slave, and, from the description, could not be the identical man claimed by the plaintiff ; but restricted it to these purposes, and refused to allow it as an excuse, or justification, or for any such purpose ; to all of which the defendants excepted."

The defendants requested the court to instruct the jury, among other things, "that if the boy was in fact a white man in all and every appearance, and would be so received and treated wherever he might go, without suspicion, where he was unknown, and the defendants and their agents had no knowledge or suspicion of his being a slave, they must find for the defendants." The court refused this charge, and the defendants excepted to its refusal.

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

DARGAN & TAYLOR, for appellant.

GEO. N. STEWART, *contra*.

STONE, J.—We deem it unnecessary in this case to decide, whether or not the transcript from the registry of ownership in the probate court of Mobile, made on the re-

port and affidavit of Bell, was or was not evidence against the other defendants in the case. The defendant Bell was afterwards introduced by the plaintiff, as a witness against his co-defendants, and testified, that he was the agent of the owners, authorized to make the report and affidavit; and that the persons therein named were at the time the owners of the steamboat *J. M. Brown*. Hence, whether the evidence, when offered, was or was not admissible against the other defendants, there can be no question of its admissibility after Bell had testified. The error, if any, was cured by his testimony.—*Shepherd's Digest*, 568, § 89; *Pamph. Acts*, 1853-4, p. 50.

[2.] The right of plaintiff to introduce Bell as a witness against his co-defendants, is plainly and explicitly conferred by the statute.—*Code*, § 2289. It is equally clear that the introduction of this witness by the plaintiff did not constitute him a general witness in the cause. It was not permissible for the defendants to examine him on any matter of defense not called out by the plaintiff in his examination.—*Hurter & Hill v. Buford*, in manuscript; *Eaton v. Kirkman*, 35 Ala. 272.

[3.] The inquiry, whether or not there had been a change of ownership of the steamboat *J. M. Brown*, between the time of the registration aforesaid, and the loss of the slave sued for, unless a statement of such change had also been made out, sworn to and filed, as the statute requires, was wholly immaterial. The owners reported on oath to the probate court, must be, as to all liabilities to the public, conclusively regarded as the owners, until they exonerate themselves in the manner pointed out by the statute.—*Acts of 1853-4*, p. 50.

[4.] The circuit court did not err in excluding the imperfectly taken deposition of the witness Moore.

[5.] "The defendants offered evidence tending to show, that the man alluded to as being lost from the boat, was a white man in all and every appearance, was recognized and treated as a white man, had hired himself on board as such, slept in the white apartments with the white people, and

could not be taken for a slave by any one not knowing the fact." The court received this evidence for a qualified purpose, namely, "for the purpose of showing that the person, alluded to was not a negro, and could not be a *slave*, and, from the description, was not the *identical* man claimed by plaintiff; but restricted it to these purposes." Several charges were also asked on this feature of the case, one of which was in the following terms: "That if the boy was in fact a white man in all and every appearance, and would be so received and treated wherever he might go, without suspicion, where he was unknown, and the defendants and their agents had no knowledge or suspicion of his being a slave, they must find for defendants." This charge was refused.

This question is not free from difficulty. The statute imperatively imposes the penalty "on any railroad companies, the master or owner of any steamboat or vessel, in which a *slave* is transported or carried, without the written authority of the owner or person in charge of said slave." Code, § 1010. Under the well established legal maxim, *partus sequitur ventrem*, a person may be a slave, and yet so far removed from the African stock, as to leave no trace of its blood or color. On the other hand, it is well settled, that color raises the presumption of *status*. A white person is presumed to be free; and, in all communities where African slavery exists, a black person is presumed to be a slave.—*Hudgins v. Wright*, 1 Hen. & Munf. 139; *Hook v. Pagee*, 2 Munf. 384; *Gentry v. McMinnis*, 3 Dana, 382; *Gatliffe v. Rose*, 8 B. Mon. 632; Cobb on Slavery, §§ 68–9; *Fox v. Lambron*, 3 Halst. 277; *Scott v. Williams*, 1 Dev. 376; 1 Phil. Ev. (Cow. & Hill's Notes, 4th ed.) 603, 665, 822.

Section 1010 of the Code is highly penal in its terms; and we do not think the case supposed in the charge copied above, is within the spirit of the statute. To hold it within the statute, might cast on railroads, owners of steamboats, &c., liabilities in cases where the greatest diligence, short of requiring proof of freedom in every case, could not

bear them harmless. To lay down a rule which leads to results so revolting to all our notions of propriety, is certainly going far beyond anything the legislature ever contemplated. We therefore hold, that the charge copied above should have been given.—1 Black. Com. 91.

In what we have said above, we do not wish to be understood as passing upon the sufficiency of the evidence in this case. That is a question for the jury. Nor do we wish to relieve officers and agents of railroads and vessels from a diligent exercise of watchfulness and scrutiny of persons who seek transportation at their hands. All we now affirm is, that when a case is brought within the facts supposed in the charge we are considering, the spirit of section 1010 of the Code has not been violated.

The circuit court erred in not receiving the evidence offered, without restriction; and in not giving the charge asked.

[6.] But there was no error in allowing proof of the value of plaintiff's counsel fees in this action. The statute expressly gives the right to recover all reasonable expenses attending the prosecution of the suit; and counsel fees are certainly expenses attending the prosecution of the suit.—Code, § 1010.

The question raised on the right to examine the witness who came in after both sides had announced their testimony closed, need not be decided, as the question will not probably be again presented in its present form.

Reversed and remanded.

LIGHTFOOT *vs.* RUPERT & McCLELLAND.

[GARNISHMENT ON JUDGMENT.]

1. *Liability of trustee as garnishee.*—Where the answer of a garnishee states, that he is the trustee in a deed of trust executed by the defend-

ant,—the validity of which is not assailed for fraud, and which provides for the conversion of the assets into money, the payment of certain preferred creditors, and the distribution of the residue among all the other creditors equally; that he has paid the preferred debts, and that the balance remaining in his hands is not sufficient to satisfy in full the unpreferred debts,—no judgment can be rendered against him on the answer, although he does not specify the names of any of the unpaid creditors.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. PORTER KING.

THE appellees in this case obtained a judgment against G. Stringer & Co., on the 16th April, 1850, and, on the 16th October, 1852, summoned the appellant, by process of garnishment, as the debtor of said Stringer & Co. The garnishee appeared, and filed a written answer on the 21st April, 1853, in the following words: "Said G. Stringer & Co. made a deed of trust, on the 31st January, 1848, to this respondent and W. S. Kyle as trustees, which was duly acknowledged, recorded," &c., and a copy of which was made an exhibit to his answer. "Respondent states, that unless, in judgment of law, he is indebted to said Stringer & Co. on the facts growing out of said deed, and on the legal construction of said deed, then he is not indebted to said Stringer & Co.," &c. "Said deed shows all that respondent ever received from said Stringer & Co., and in what it consisted; and aside from it respondent has nothing of theirs in his hands. Said deed was destroyed by fire, in June, 1852, together with all the notes which had been paid off, and the cash book kept by the person who was employed to keep the accounts; and respondent is therefore unable to state an account-current between himself and said trust fund. The funds collected by respondent under said deed, to the amount of some four or five thousand dollars, according to the best of his recollection, were applied to the payment of the creditors preferred in said deed before the service of the garnishment in this case; but, since that time, he has paid out nothing to any one, and has held all the means he then had in hand subject

to the judgment of the court. After paying the preferred creditors, respondent applied the funds, *pro rata*, to the payment of the general creditors not preferred in the deed. This was done, as the means were realized, until the service of the garnishment. The general indebtedness of said Stringer & Co., not preferred in the deed, amounts to about ten thousand dollars; and some of them are now claiming their distributive share of the fund. William Douglass & Co., of Wetumpka, have a debt of about seventeen hundred dollars, on which they claim their *pro-rata* share. In executing the trust, selling the goods, and collecting the debts, the trustees were compelled to incur expenses, which respondent claims a right to retain, together with a reasonable compensation for his trouble. The means in his hands, after allowing his expenses as stated, will not exceed seven hundred dollars; and this balance, when collected, respondent will hold ready to apply as the court may direct," &c.

At the spring term, 1856, a citation was ordered to William Douglass & Co., to appear and contest with the plaintiffs their right to the funds in the hands of the garnishee; but the record does not show that they ever appeared. At the September term, 1858, the garnishee filed the following supplemental answer: "The amount of assets conveyed to respondent by said deed of trust, and now in his hands, with interest thereon, is about seventeen hundred dollars; of which amount, about five hundred and forty dollars, including interest, is a debt due from his co-trustee, W. S. Kyle, or rather from his estate, a part of which was due at the execution of said deed, and the balance has been contracted since; none of which has ever been received by garnishee, and for which he insists he is not liable. Respondent is also entitled to a credit, for his individual services and expenses in the execution of said trust, of three hundred and six dollars; which leaves the sum of eight hundred and fifty-four dollars now in his hands. There are still outstanding against said Stringer & Co. about \$9,773, on which nothing has been paid. These were all debts ex-

isting at the execution of said deed, and \$7,132 28 of the same is now in judgment against said defendants. Respondent submits to the court, whether said money is subject to this garnishment, or to be distributed among said creditors."

The court rendered judgment against the garnishee, for eight hundred and fifty-four dollars ; to which he excepted, and which he now assigns as error.

L. E. PARSONS, for appellant.

N. S. GRAHAM, *contra*.

A. J. WALKER, C. J.—The deed of trust, which is not assailed for fraud, vested in the trustee the assets conveyed for the purposes therein specified. Those purposes were, the conversion of the assets into money, and the payment first of certain preferred creditors, and afterwards the distribution of the balance among the creditors generally. The answer of the garnishee shows, that the preferred debts have been paid, that a balance remains in his hands, and that it is insufficient to satisfy the unpreferred creditors of the grantor. The purposes, therefore, for which the trust was created, were not accomplished ; and after the execution of the trust, there neither is, nor will be, a surplus in the hands of the trustee. The trustee is, therefore, not indebted to the plaintiffs' judgment debtor in any sum which could be recovered by action at law, and no judgment could properly be rendered against him as a garnishee. *Price v. Masterson*, 35 Ala. 483.

If the answer is objectionable, on account of its failure to disclose the names of the creditors who were to be paid from the trust fund, it was no reason why a judgment against the garnishee should be rendered on the answer. Before a judgment can be rendered on an answer, there must be a distinct admission of a debt due, or to become due.—*Price v. Thompson*, 11 Ala. 875 ; *Powell v. Sammons*, 31 Ala. 552. The answer here contains no such admission.

Reversed and remanded.

MOORE vs. MADISON COUNTY.

[ACTION ON OFFICIAL BOND OF COUNTY TREASURER.]

1. *Liability of county treasurer and sureties on official bond.*—Where a county treasurer is re-elected several successive terms, the sureties on his official bond for any one term are responsible for money converted by him during that term, whether received during the term, or remaining in his hands at the expiration of the preceding term; but, where his receipt of money during the term is shown, and there is no evidence of any conversion of it during the term, he may discharge himself by proof of disbursements after the expiration of the term.
2. *Conclusiveness of report of examining committee.*—The report of an examining committee, appointed under the act of 1822, (Clay's Digest, 580, § 28,) which shows a balance in favor of the county treasurer, and which is approved by the commissioners' court, is no bar to a subsequent action on the official bond of the county treasurer.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the appellee, against Benjamin T. Moore and John H. Lewis; was founded on said Moore's official bond as county treasurer of Madison, and was commenced on the 16th January, 1854. The defendants pleaded the general issue, with leave to give in evidence any special matter of defense. At the August term, 1857, by agreement of record, the matters in controversy were referred to the arbitrament of Isaiah Dill, "upon the following terms and principles: Said Dill shall take and state an account, charging the defendants with all sums of money received by said Moore, as county treasurer, during the period covered by the bond in suit, and with all sums with which he may be legally chargeable in consequence of any and all acts of omission and commission during that period, and crediting him with all sums lawfully paid out or disposed of by him during the same period; and shall report the result to the court, as his award. But, in stating the account, and making up his award, the arbitrator shall give the defendants the full legal benefit of all legal

settlements made by him with the commissioners' court, and of any and all other defenses of which he would be allowed the benefit on a trial in the circuit court; it being the intention of this agreement, that all evidence which would be legal, and every fact which would be available to either party in the circuit court, shall be admissible before the arbitrator, and have the same effect as if the cause was tried in the circuit court; and neither party waives by this agreement any right which he would have if the cause was tried in that court. In taking said account, the arbitrator shall decide all questions presented on legal principles, and note the same in his report when desired by either party; and all questions so reported shall be open for revision by the court, and shall be so revised and decided, at the desire of either party, on the coming in of the report. If the decision of the court on any question be adverse to the decision of said arbitrator, the award shall, in that respect, and to that extent, be referred back to him for correction. In all other respects, the award shall be final, and, when corrected as above, shall be made the judgment of the court. The action of the court on said award is to be subject to revision or appeal."

On the hearing before the arbitrator, the plaintiff read in evidence the bond on which the suit was founded, which was dated the 5th February, 1835, and conditioned that the said Moore "shall well and truly perform and execute the duties of the said office of county treasurer, and shall also account for and pay over, according to law, all moneys and county funds that may come into his hands as such, duly and faithfully"; and proved that said Moore was re-appointed county treasurer on the 5th February, 1838, and continued to act as such treasurer until the 5th December, 1842. The arbitrator rejected all the evidence offered by the plaintiff, showing the receipt of money by said Moore, at different times, between the 5th February, 1835, and the 16th January, 1838, on the ground that the statute of limitations of sixteen years was a bar as to those items; and he also rejected the defendant's evidence of disburse-

ments made during the same period. The plaintiff proved that, on the 23d January, 1838, the tax-collector of the county paid to Moore, as county treasurer, the sum of five hundred dollars. The defendant then offered to prove payments and disbursements, made by said Moore, as county treasurer, between the 5th February, 1838, and the 1st January, 1839, amounting to about one thousand dollars; "which was refused to be allowed, because the said Moore entered on a new term of office as treasurer on the 5th February, 1838, and executed a new bond, with other and different sureties;" and to this decision of the arbitrator the defendants excepted.

The defendants read in evidence, "as a bar to this suit," from the records of the commissioners' court of the county, several entries, showing that, on the 15th April, 1844, the report of three commissioners, who had been previously appointed by that court to examine the accounts of the county treasurer, was approved, and ordered to be recorded; that said commissioners reported a balance of over five hundred dollars as being due to said Moore on settlement of his accounts; and that the court made an order, directing his successor to pay him the balance so reported in his favor. The arbitrator held, that this was not a bar to the action.

The arbitrator, in his award, reported a balance of twelve hundred and eighty dollars in favor of the plaintiff, being the item of five hundred dollars above mentioned, with interest thereon; and his award was confirmed by the court, and entered up as its judgment. There is no bill of exceptions in the record; but the minute-entry recites, that each party excepted to the ruling of the court in confirming the award. From this judgment the defendant Moore appeals, and here assigns the same as error, together with several rulings to which he reserved exceptions before the arbitrator.

S. D. J. MOORE, for appellant.

R. C. BRICKELL, *contra*.

STONE, J.—The undisputed facts in this case show, that, shortly before the expiration of the term of office covered by the bond which is the foundation of this suit, Mr. Moore received a sum of money, which had not been disbursed at the time of his re-appointment. There is no evidence in the record, that, during that time, he had converted that sum of money, nor, in fact, that he ever did convert it; unless a conversion can be inferred from the fact of its reception, and the absence of proof of its disbursement during that term.

Mr. Moore held the office of county treasurer of Madison for several consecutive terms. At the end of the term, during which he is charged with having committed the present default, he was re-elected, and thus became his own successor. Whatever funds he may have held at the end of his first term, it was his duty, under his second election, to hold, subject to proper debts and orders against the treasury. He was, by law, made the custodian of the funds; and merely retaining them until it became his duty to pay them out on debts or orders, could not constitute him a defaulter. In truth, the law cast on him the duty of holding the funds, until after-accruing liabilities should require their disbursement. It was early ruled in this court, that when a county treasurer has held the office for two or more terms, the liabilities of the sureties on the second bond are not necessarily limited to moneys which came to the hands of their principal after they became his sureties; but that for moneys held by him at the time they executed their bond, they are equally liable, if he afterwards commit default in respect of them. This, we think, results necessarily from the fact, that the treasurer is made the custodian of the county funds.—See *Townsend v. Everett*, 4 Ala. 607-11; Clay's Digest, 578-9, §§ 15, 17; Toulmin's Digest, 758, § 5.

The primary court clearly erred in restricting Mr. Moore's proof to disbursements made by him during the term in which they were received; that being the only term covered by the bond in suit. He should have been allowed

to prove after-payments, as tending to rebut the evidence of default charged. If the funds were converted during the term covered by this bond, no matter when received, the treasurer and these sureties are liable for it. But, if there be no evidence of conversion during this term, the present sureties cannot be held accountable for funds held over, or for conversions after the period of their bond has expired.

[2.] We do not think the report of the examiners, appointed under the 3d section of the act of 1822, (Clay's Digest, 580, § 28,) can operate a bar to this suit. The statute asserts no such purpose, and we can perceive no good reason for engrafting upon it a feature so important.

Reversed and remanded.

R. W. WALKER, J., having been of counsel, not sitting.

SEGREST vs. SEGREST'S HEIRS.

[BILL IN EQUITY FOR FORECLOSURE OF EQUITABLE MORTGAGE.]

1. *Extension of time for payment of mortgage debt; dismissal generally, and without prejudice.*—Where a mortgagor files a bill to redeem, and is allowed a day for the payment of the money into court, but fails to make the payment within the time prescribed by the decree, without any fraud, accident, or mistake, the chancellor is not bound to extend the day of payment, but may dismiss the bill; nor is there any rule which requires, in such case, that the dismissal shall be without prejudice.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 9th January, 1860, by David Segrest, against the personal representative and heirs-at-law of his deceased brother, Reuben Segrest, Absalom Eady and wife, and Jesse P. Felts and wife; and

sought to redeem a tract of land, which the complainant purchased from said Eady and wife on the 21st November, 1855, and which was afterwards conveyed, at his instance, by said Felts and wife, who had the legal title, to said Reuben Segrest, since deceased, who advanced for the complainant a portion of the purchase-money. Decrees *pro confesso* were regularly entered against Eady and wife, and Felts and wife. An answer was filed by the other defendants, denying all knowledge of the alleged mortgage, and requiring strict proof thereof. At the November term, 1860, on hearing on pleadings and proof, the chancellor held the complainant entitled to relief, and ordered the master to take an account of the mortgage debt. At the May term, 1861, the master's report was confirmed; and the chancellor rendered a degree, requiring the complainant to pay into court, by the first day of the next term, the amount reported to be due on the mortgage debt; ordering his bill to be dismissed, on his failure to make the payment within the prescribed time, and directing a conveyance to be made to him on his making the payment as required.

On the first day of the next succeeding term, the master reported that the complainant had failed to pay the money into court; and on the fourth day of the term, the complainant filed his petition in court, asking for an extension of the time within which to make the payment, and offering to pay the money into court immediately. The petition alleged, that he had failed to make the payment from necessity; that he had been induced to rely on the promises of two friends, who were willing, and ordinarily able, to procure the money for him; that in consequence of the unsettled state of the country, and the suspension of business in the circuit court that fall, his friends had failed to raise the money for him; that on Saturday before the commencement of the court, having come into town for the purpose of completing other arrangements to obtain the money, he was informed by his counsel that the court would not be held, and that it would be sufficient to

pay the money by the next term; and that, in consequence of this information, he did not come to town on the first day of the term. The petition was duly sworn to, and was supported by the affidavits of other persons.

The chancellor overruled the petition, and dismissed the bill; and his decree is now assigned as error.

GUNN & STRANGE, for appellant.

GRAHAM, MAYES & ABERCROMBIE, *contra*.

A. J. WALKER, C. J.—The earliest decision upon the question, whether the chancellor will allow an extension of the time prescribed in his decree for the payment of the mortgage debt, is that of Lord Eldon in *Novosielski v. Wakefield*, 17 Vesey, 417. In that case, the lord chancellor distinguishes between suits to foreclose, and suits to redeem; and, while he concedes that the practice is to extend the time of payment in the former cases, he denies that there is any precedent for the extension in the latter, and refuses to begin such a practice. The reason given for the discrimination is, that the mortgagor's attitude in the two cases is altogether different. In a foreclosure suit, the proceeding is against him, to compel the payment of the debt, or effect a forfeiture of his estate; while, in a redemption suit, "he comes into court, saying, 'here is the money, give me my estate'." This decision of Lord Eldon was followed in the case of *Falkner v. Bolton*, 7 Sim. 319.

In this country, the decision of Lord Eldon seems to have the sanction of Chancellor Kent.—*Perine v. Dunn*, 4 Johns. Ch. R. 140; *Brinkerhoff v. Lansing*, *ib.* 65. In Vermont, the practice which restricts the mortgagor to the time of payment prescribed in the decree, has been applied to foreclosure, as well as redemption suits.—*Smith v. Bailey*, 10 Vermont, 163. See, also, *Turner v. Turner*, 3 Munf. 66; *Waller v. Harris*, 7 Paige, 167; 1 Powell on Mortgages, 403, *n*; 3 *ib.* 999; Hilliard on Mortgages, 39, § 17. An industrious examination has enabled us to find no case, in which the right of the mortgagor to pay the debt and

perfect his redemption, after the time limited in the chancellor's decree, is maintained ; and we infer that the practice adopted by Lord Eldon is regarded, both in England and America, as established. We cannot decide that the chancellor erred in adopting and following that practice.

The prevailing distinction above alluded to, between foreclosure and redemption suits, renders the precedents referred to by the appellant's counsel, as to the practice in the former, inapplicable to the question decided by the chancellor. We do not decide, that relief could not be granted, in a case the facts of which brought it within the recognized ground of chancery jurisdiction in cases of fraud, accident, or mistake, unmixed with negligence on the part of the party himself. This case is totally unlike that of *Delage v. Hazzard*, 16 Ala. 196. The question there was not as to redemption, and the complainant seems to have been prevented by the act of the register from complying with the prescribed condition.

It is contended, that the dismissal of the complainant's bill ought, at all events, to have been without prejudice to his right to file another bill. An authority of high repute, upon questions of pleading and practice, declares, that this qualified order of dismissal is made where the dismissal is occasioned by any slip or mistake in the pleadings or in the proof.—2 Dan. Ch. Pl. & Pr. 1200. The dismissal of the complainant's bill in this case did not result from any slip or mistake in the pleadings or proof, but from his failure to comply with an order of the court, to pay a certain sum of money, which, by his bill, he had proposed to pay. This failure was occasioned, either by his negligence, his inexcusable misapprehension of his duty, the negligence of others in whom he confided, or by a combination of all these causes. He has no claim, either upon the law, or upon the score of charity, to an opportunity for the renewal of the litigation. In this State, numerous decisions upon the subject of dismissals without prejudice have been made, none of which announce a doctrine which would sustain the appellant's argument on this point.—*Danforth v. Her-*

Bell's Adm'r v. Nichols.

bert, 32 Ala. 497 ; *Cameron v. Abbott*, 30 ib. 416 ; *Cornelius v. Cornelius*, 31 ib. 479 ; *Holly v. Wilkinson*, ib. 126 ; *Rumbly v. Stainton*, 24 ib. 718 ; *Stiles v. Lightfoot*, 26 ib. 444 ; *Crabb v. Thomas*, 25 ib. 212 ; *Andrews v. Hobson*, 23 ib. 219 ; *Micham v. Wyatt*, 21 ib. 813 ; *Larkins v. Biddle*, ib. 252 ; *McCullough v. Walker*, 20 ib. 389 ; *Lang v. Waring*, 17 ib. 145 ; *Goodman v. Benham*, 16 ib. 625 ; *Gayle v. Singleton*, 8 Porter, 270 ; *Maurry v. Mason*, ib. 213 ; *Wilkins v. Wilkins*, 4 ib. 242 ; *Harris v. Carter*, 3 St. 233.

The decree of the chancellor is affirmed.

BELL'S ADM'R vs. NICHOLS.

[DETINUE FOR SLAVES.]

1. *When statute of limitations begins to run against decedent's estate.*—Where a decedent dies in another State, and letters testamentary or of administration on his estate are there granted by the proper tribunal, the statute of limitations of this State begins to run against his estate from the time of such appointment, although such foreign administrator may have never had his letters recorded here, as authorized by the act of 1821. (Clay's Digest, 227, § 31.)
2. *Error without injury in rulings adverse to plaintiff.*—Where the record affirmatively shows that the plaintiff can never recover in the action, the appellate court will not, at his instance, examine into the correctness of any rulings of the primary court adverse to him, since they are, at most, error without injury.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by Burgess Garner, as the administrator *de bonis non* of Frederick Bell, against Darius D. Nichols, to recover several slaves, together with damages for their detention ; and was commenced on the 1st October, 1859. The record does not show what pleas were filed. The slaves in controversy, as appeared from the evidence adduced on the trial, belonged to said Frederick Bell

in 1821, in North Carolina; were given by him, by verbal gift, to his grand-daughter, Elizabeth Bullock, who was then an infant, residing with her father, W. K. Bullock; were brought to this State by said Bullock, in 1835, and continued in his possession, until the 19th March, 1850, when he conveyed them, by deed of trust for the benefit of his creditors, to W. H. Dandridge and another as trustees; were sold by the trustees, under the deed, and were purchased at their sale by the defendant. Bell died, in North Carolina, in 1845, and, by his last will and testament, bequeathed the said slaves to his said grand-daughter. His will was duly admitted to probate in North Carolina, and letters testamentary thereon were granted to Russell Chapman, as executor, in February, 1846; but the will was never probated in this State until 1859, when the plaintiff qualified as administrator *de bonis non*. The slaves were never in North Carolina after their removal by Bullock in 1835, and were not included by the executor in his inventory. The plaintiff reserved exceptions to the ruling of the court in allowing Bullock to testify as a witness for the defendant, and to the charge to the jury as to the effect of an assent to the legacy by the executor in North Carolina while the slaves were in Alabama; and these rulings of the court are now assigned as error.

T. REAVIS, for appellant.

No counsel appeared for the appellee.

STONE, J.—Among the uncontroverted facts of this case are the following: That some time before his death, Frederick Bell, then a resident of the State of North Carolina, made and executed his last will and testament, which was probated and admitted to record in that State, in February, 1846: That Russell Chapman, the executor therein named, qualified at the same time as executor, and entered upon the execution of said will: That the slaves sued for were then in the possession of one Whitwell K. Bullock, in the State of Alabama, and remained in his possession until

1850, or later : That, however said Bullock may have held said slaves until March 19th, 1850, his holding, and that of those who claim under him, then became clearly adverse and in his own right, by force of the conveyance he then made of said slaves as his own property : (*Graham v. Davidson*, 10 Iredell Law, 248 ; *Bryan v. Weems*, 29 Ala. 427-8 :) That the administrator *de bonis non*, with the will annexed, the present plaintiff, did not prove said will, nor qualify as administrator, until 1859, much more than six years after the above assertion of adverse ownership by Mr. Bullock ; and that this suit could not have been commenced, and was not commenced until after that time. Upon these plain, uncontroverted facts, it is clear that the statute of limitations of six years operated a complete bar to the present action, under the principle laid down in the case of *Manly's Adm'r v. Turnipseed*, 37 Ala. 522. We held in that case, that the foreign executor or administrator had, under our statute, a right to sue for assets in our courts ; and there being a person capable of suing, the statute would run without the appointment of an administrator in this State. We deem it unnecessary to repeat the argument.

[2.] This principle demonstrates that the plaintiff never can recover in this action ; and we will not, therefore, notice the special exceptions taken below, and argued here. Those exceptions could not affect the main question in this cause, noticed above ; and hence we need not decide the points presented by them.

The judgment is affirmed.

WATERS vs. WILLIAMS.

[ACTION FOR USE AND OCCUPATION OF LAND.]

1. *Extent of widow's quarantine*.—A plantation, about eight miles distant from the husband's residence at the time of his death, and from which

he drew the greater part of his provisions and household supplies, is not so connected with the residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof until her dower is assigned.

2. *Action by widow for rents of dower lands.*—A widow cannot maintain an action at law, to recover the rents, or mesne profits, accruing from the lands assigned as her dower, from the death of the husband, to the time her dower was allotted: her only remedy is in chancery.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by Mrs. Mary E. Williams, the widow of Caleb Williams, against Allen G. Waters, who was the administrator of said decedent, to recover for the use and occupation by the defendant of a plantation which belonged to the decedent at the time of his death; and was commenced on the 12th December, 1859. By agreement between the parties, after the evidence was closed, the jury returned a special verdict, as follows:

“Caleb Williams, whose only occupation was that of a planter, some years before his death, had resided with his family on his plantation in Marengo county. Three or four years before his death, he purchased a residence in the village of Jefferson, in said county, with about two hundred acres of land attached to it, and obtained a fee-simple title to it; and removed with his family, and resided there until his death, which took place on the 1st January, 1857. After his removal to Jefferson, he declared that he had removed there for the purpose of educating his children. Some short time after his removal to Jefferson, he married the plaintiff, and had three or four children by her; and he continued to reside there, with his wife and children, until his death. His plantation, which consisted of one thousand acres of land cleared and reduced to cultivation, was about eight miles from the dwelling-house. For years before his death, and up to the time of his death, said Williams cultivated said plantation, with the slaves thereon belonging to him, and raised crops thereon; and his slaves were employed at the time of his death in making a crop thereon. While said Williams resided at Jefferson, the meal for his

family was sent from said plantation to his residence every week, and butter once or twice a week. The pork for his family was killed at the plantation, and sent to his residence; and fresh meat, such as pigs, mutton, and beef, was also sent to his residence, from the plantation, whenever ordered. His supplies of corn and fodder, and his milch cows, were also obtained from the plantation; and poultry, which was raised by the negroes on the plantation, was bought by him for himself and family, and taken to his residence. Some twelve or fourteen acres of the land attached to his residence was cleared by him; of which, one or two acres was planted with fruit trees for an orchard, and the residue (immediately around the house) was usually planted in peas, potatoes, and corn for roasting ears. During his life-time, and at the time of his death, said Williams kept about his residence three or four horses, and four or five slaves for house servants.

"Said Williams died intestate. About twenty days after his death, letters of administration on his estate were duly granted by the probate court of the county to the defendant, who qualified, and took on himself the burden of the administration, and took the control and possession of said plantation, slaves, mules, and farming utensils; and said slaves, mules, and farming utensils, were continued on said plantation, under his control and in his possession, in making a crop of cotton and corn, until the last day of December then next ensuing. The defendant did not interfere with the house servants, the dwelling, or the land attached thereto, or with any of the property at the residence; but the same remained in the possession, and under the control of the plaintiff, as the widow of the intestate, from the time of his death, to the end of that year. The intestate had an absolute title in fee to two hundred acres of said plantation; to four hundred acres he had a conveyance in fee from one Mitchell, but had not paid all the purchase-money at the time of his death, the balance (about \$5,000) being paid by the defendant, as his administrator, since his death; and to the remaining four hundred acres

he had only a bond for titles, and had paid no part of the purchase-money. No dower whatever in the lands of said intestate was allotted to the plaintiff, until April, 1859. The year the defendant raised said crop on said plantation, the use and occupation of the land was worth one dollar and fifty cents per acre, making in all \$1500. In December, 1858, the defendant, as administrator, made a partial settlement of his administration on said estate, with the probate court of said county. The plaintiff appeared, and was represented by counsel on said settlement; the defendant was charged with the sum of ten thousand dollars, the proceeds of the said crop raised by him on said plantation; and said court rendered a decree, of which the following is a copy," &c.

On the facts found in the special verdict, the court decided—"1st, that the plaintiff, as the widow of said intestate, was dowable of six hundred acres of said plantation, and was entitled to recover of the defendant, in this action, the value of the use and occupation thereof for the time he had the same under his control and possession during the year in which the intestate died; 2d, that the settlement made by the defendant with the probate court did not estop the plaintiff from recovering in this action; and, 3d, that the plaintiff was not dowable of the four hundred acres of land for which the intestate held only a bond for titles, and had paid no part of the purchase-money, and that she was not entitled to recover the value of the use and occupation thereof." Each party excepted to the rulings and judgment of the court. The defendant now appeals, and assigns as error the rulings of the court in favor of the plaintiff's right to recover.

BROOKS & GARROTT, for appellant.

JNO. T. LOMAX, *contra*.

STONE, J.—Under the special verdict, or agreed facts in this case, the plantation, for the use and occupation of which the action was brought, was not "connected" with

"the dwelling-house where her husband most usually resided next before his death."—*McAllister v. McAllister*, 37 Ala. 484; *Smith v. Smith*, 13 Ala. 334. Hence, we hold, that this case does not come under the operation of section 1359 of the Code.

[2.] The principle above announced is decisive of this case, as made by the pleadings; but, as these may be modified, we feel it our duty to pass on the plaintiff's right to recover, in an action at law, for the rents, or mesne profits, accruing from the lands assigned her as dower, from the death of her husband, to the time when her dower was allotted.

The widow's right to have dower assigned to her, is not a legal right in the land, nor in any portion of it.—See *Doe v. Webb*, 18 Ala. 814, and authorities cited. The lands, in the present case, are not covered by the widow's quarantine; and hence, on the mere strength of her right to be endowed, she could maintain no action to recover the possession, nor for the rents and profits of the lands.—*Inge v. Murphy*, 14 Ala. 289; *Shelton v. Carroll*, 16 Ala. 148; *You v. Flinn*, 34 Ala. 409; *Hayden and Wife v. Tucker*, in manuscript.

That chancery can furnish the plaintiff a remedy, and the only remedy to which she is entitled under the facts of this case, is clear on principle, and is fully sustained by authority.—*Slatter v. Meek*, 35 Ala. 538–9; *Perrine v. Perrine*, *ib.* 644; *Barney v. Frowner*, 9 Ala. 901; *Beavers v. Smith*, 11 Ala. 20; 1 Story's Equity, § 626; *Turner v. Morris*, 27 Miss. 733; *Curtis v. Curtis*, 2 Bro. Ch. 619.

The judgment of the circuit court is reversed, and the cause remanded, that that court may make the proper order disposing of the case.

FICKLING vs. BREWER.

[APPEAL CASE FROM JUSTICE'S COURT.]

1. *Note not extinguishment of debt.*—The giving of a note, without more, is not a satisfaction of the pre-existing indebtedness.
2. *Presumption in favor of judgment.*—Where the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, against the appellant, that the primary court properly refused to instruct the jury, at his instance, that they must find for him if they believed the evidence.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. NAT. COOK.

THIS action was brought by John R. Brewer, against Mrs. Frances Fickling; was commenced in a justice's court, and thence transferred by appeal, at the instance of the defendant, to the circuit court, where the plaintiff filed a complaint, claiming of the defendant the amount of an account for certain necessary articles of family supply furnished to her during coverture; alleging that she was a married woman at the time, and that she owned a separate estate under the provisions of the Code. On the trial in the circuit court, the defendant reserved exceptions to the refusal of two charges to the jury as requested; and she now assigns as error the rulings of the court shown in the bill of exceptions.

PORTER & HENRY, for appellant.

STONE, J.—The assignments of error raise no question on the sufficiency of the complaint, the admissibility of evidence, or the judgment rendered in this cause. Hence, what we say in this opinion is not to be construed as committing us upon any of these propositions. See *Rodgers v. Brazeale*, 34 Ala. 512,

The only error assigned is, that "there is manifest error

in this, that the court erred as is shown in the bill of exceptions." The bill of exceptions shows only two matters to which the defendant excepted—1st, the court refused to charge the jury, at the instance of the defendant, "that a note having been given to Skipper by the husband of defendant, and received by him, and transferred to plaintiff, the account was merged in the note, and plaintiff could not recover on an account for what was the consideration of the note." The giving of a note, without more, is not a satisfaction of the pre-existing indebtedness.—*McCreary v. Carrington*, 35 Ala. 700; *Sharp v. Burns*, *ib.* 653; *Mooring v. Ins. Co.*, 27 Ala. 258; *Dorrance v. Jones*, *ib.* 630.

[2.] The second charge asked and refused was, "that if the jury believed the evidence, they must find for the defendant." The record does not inform us that it contains all the evidence; and we cannot presume either the existence or absence of evidence, as a reason for putting the circuit court in error. The presumptions are precisely the other way; and hence we must presume, if necessary, that there was evidence, not set out, which justified the court in withholding the instruction prayed for.—*School Commissioners v. Godwin*, 30 Ala. 242; *English v. McNair*, 34 Ala. 40; *Shepherd's Digest*, 572, §§ 145–146.

The assignment of error presents no ground for reversal, and the judgment of the circuit court is affirmed.

DEMING'S ADM'R vs. HAMIL.

[APPEAL CASE FROM JUSTICE'S COURT.]

1. *Examination of parties as witnesses; error without injury.*—The ruling of the primary court, in holding the plaintiff to be a competent witness for himself, in an action against an administrator, (Code, § 2313,) is, at most, error without injury, when the record shows that he only testified to a demand under twenty dollars, as authorized by section 2779.

2. *Same ; remission by plaintiff of part of demand sued for.*—In an action on an open account, commenced in a justice's court, and removed by appeal to the circuit court, the plaintiff may, by a practice long sanctioned in this State, remit the excess of his demand over twenty dollars, and thereby render himself a competent witness for himself under section 2779 of the Code.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. NAT. COOK.

THIS action was brought by A. A. Hamil, against John W. Mallett, as the administrator of E. Deming, deceased ; was commenced before a justice of the peace, and removed by appeal, at the instance of the defendant, to the circuit court ; and on the trial in that court, the following bill of exceptions was reserved by the defendant :

"This was an action on an account. The sum claimed by the plaintiff was twenty-five dollars, alleged to be due to him by the defendant's intestate, on a contract made between them, by which, in consideration of the sale of a house and lot by the plaintiff to said intestate, for two hundred dollars, said intestate paid one hundred and seventy-five dollars, and agreed to pay the remainder in lumber, to be gotten at his mill by the plaintiff. The intestate died a short time afterwards. The plaintiff proposed to prove these facts by his own oath, there being no other witness ; to which the defendant objected, because the suit was against him as administrator, and was founded on a contract made by his intestate. The court overruled the objection, and permitted the plaintiff to propose to testify. The defendant then made oath that, according to the best of his knowledge and belief, the testimony proposed to be given by plaintiff was untrue ; and the plaintiff was not permitted to testify. The plaintiff then proposed to strike off all the account, except nineteen dollars and fifty cents ; which the court allowed him to do, against the defendant's objection. The plaintiff then became a witness, and the defendant also ; and judgment was rendered against the defendant, as administrator as aforesaid ; to all of which the defendant excepted."

It is now assigned as error, that the court erred as shown in the bill of exceptions.

PORTER & HENRY, for appellant.

STONE, J.—It is not necessary for us to decide in this case, whether or not the plaintiff below was competent to prove his demand of twenty-five dollars, against the estate of the defendant's intestate. He did not testify to a demand exceeding twenty dollars; and hence, the decision made by the circuit court on this point, whether right or wrong, did not injure the appellant.—Code, § 2779; *McLendon v. Hamblin*, 34 Ala. 86.

[2.] The only remaining exception is, that the circuit court allowed the plaintiff to remit all of his demand over \$19 50, and then become a general witness in the cause. That practice has too long prevailed in this State, and received the sanction of this court, to be now open to controversy.—*King v. Dougherty*, 2 Stew. 487; *Bentley v. Wright*, 3 Ala. 607; *Henderson v. Plumb*, 18 Ala. 74; *Crabtree v. Chiatt*, 22 Ala. 181.

The judgment is affirmed.

MARTIN vs. FOSTER'S EXECUTOR.

[ANNUAL SETTLEMENT OF EXECUTOR'S ACCOUNTS.]

1. *Marriage of female guardian.*—The marriage of a woman, who has been appointed and qualified as guardian of her infant children by a former husband, has the effect of joining her husband with her in the guardianship.
2. *Charge for board of ward allowable to guardian, but not as executor.*—There is no principle of law, which denies to the husband, who, by marriage, became guardian jointly with his wife of her infant children by a former husband, the right to charge his wards a reasonable sum for their board; but he cannot claim a credit for their board or tuition, on settlement of his accounts as executor of his deceased wife's will.

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3. *What are assets in hands of husband as executor.*—Where the wife devises to her husband, in absolute right, her interest in a plantation on which their slaves are worked in common; and bequeaths all the residue of her property to him, in trust, after the payment of her debts, for her children; the husband is chargeable, on settlement of his accounts as her executor, with the hire of her slaves during the time he retains possession of them after her death.
4. *Payment by husband of debts contracted by wife dum sola.*—Under the provisions of the Code, the husband is not entitled, on settlement of his accounts as executor of his deceased wife, to a credit for debts contracted by the wife *dum sola*, and paid by him during the coverture, but not shown to have been paid at the instance or request of the wife; *secus*, as to such payments made by him after he had qualified as her executor.

APPEAL from the Probate Court of Macon.

IN the matter of the estate of Mrs. Martha A. Foster, deceased, on an annual or partial settlement by Benjamin F. Foster, who was her husband, of his accounts and vouchers as her executor. The testatrix and Benjamin F. Foster were married on the 3d October, 1857; she being at that time a widow, and having three infant children living, whose guardian she was by regular appointment from the probate court of Macon. The testatrix died in August, 1859, having executed and published her last will and testament, which was duly admitted to probate after her death, of which her husband was appointed the executor, and which contained the following provisions: "I will and devise to my husband, Benjamin F. Foster, all the interest which I may have in and to the plantation, situated, lying, and being in Macon county, now occupied by our negroes, and cultivated by my said husband; to him and his heirs forever. All the residue of my estate, of every kind and description, wherever the same may be situated, I will, devise, and bequeath to my said husband, in trust, first, for the payment of all the debts and liabilities existing against my estate, if any; and, after this is done, then in trust for my three children, Lizzie, Charles, and Peyton Martin. In the execution of this trust, I do hereby authorize and request my said husband to keep my children with him, and to use the negroes and other property in the same manner

as we have been accustomed to do during our coverture, and, out of the annual profits, to expend from time to time such sums as he may deem necessary in the education and moral training of my children;" "and when they severally arrive at the age of twenty-one years, or marry, I authorize and direct my said husband to apportion to each one one-third of all the property hereby vested in him for their benefit, and deliver the same into his or her possession."

The children were represented on the settlement by a guardian *ad litem*, who reserved several exceptions to the rulings of the court; and these rulings, which will be readily understood from the opinion, are now assigned as error.

MARTIN, BALDWIN & SAYRE, for appellants.

N. S. GRAHAM, *contra*.

STONE, J.—When the appellee intermarried with Mrs. Martin, he thereby became joined with her in the guardianship of her children by Mr. Martin, her former husband. *Carlisle v. Tuttle*, 30 Ala. 613-624. We know of no principle of law which denies to him the right to charge his wards a reasonable sum for their board. But neither this charge, nor the one for their tuition fees, accruing, as these items did, during coverture, can come up in the settlement of Mrs. Foster's estate. They are no charge against the collective estate, and can only be considered in adjusting the accounts between the appellee and the children.

[3.] Mrs. Foster, by her will, devised all the interest she had in the plantation in their possession, to Mr. Foster, her husband. She then bequeathed all the residue of her estate for the payment of all the debts and liabilities against her estate, and afterwards in trust for her three children, &c. Under this clause, it seems clear to us that Mr. Foster, in his settlement, should have been charged with the value of the use of the slaves for the two years after Mrs. Foster's death, as so much in his hands which should have gone towards the extinguishment of her debts. Whether,

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in the after administration of this fund, there will not arise a question of personal trust which the probate court is incompetent to adjudicate, is a point not now before us.—See *Billingsley v. Harris*, 17 Ala. 214; *Vincent v. Rogers*, 30 Ala. 471.

[4.] Mr. Foster claimed, and was allowed, credits for several sums paid by him, during the coverture, on debts of Mrs. Foster, contracted before their marriage. There is no proof that these payments were made at the instance and request of Mrs. Foster, but, so far as we can learn, they were gratuitously made. Under these circumstances, these credits should not have been allowed.—*Williams v. Sims*, 22 Ala. 512. But, probably, there is another reason for their rejection. Mr. Foster, as trustee for his wife, was, no doubt, in the possession of the rents, income, and profits of her estate. The estate was considerable, as the record informs us. Now, although he was not liable to account with *her, her heirs, or legal representatives*, for the rents, income, or profits; still, so far as he applied the income to the payment of her debts, or for her use, he has no claim against her or her estate.—See *Rogers v. Boyd*, 33 Ala. 175. These must be regarded as so much gratuitously paid out, or as expenses incurred by him in keeping up the estate, in the successful working of which he was largely interested.

Payments made by Mr. Foster, after he became executor, of debts due by Mrs. Foster, stand on a different footing. The law makes it his duty to pay these debts, if assets sufficient come to his hands; and such payments, rightfully made, are a charge against the estate in his hands.

What we have said will probably be a sufficient guide on another trial.

Reversed and remanded.

KIRKSEY vs. STEWART & LUCIUS.

[BILL IN EQUITY TO ESTABLISH GIFT OF SLAVES AGAINST EXECUTION CREDITORS OF GRANTOR.]

1. *Marshalling securities between grantee and execution creditors of grantor.*—The grantee in a deed of gift cannot maintain a bill in equity against subsequent execution creditors of the grantor, to compel a resort by them to lands conveyed by the grantor in trust for their benefit.
2. *When wife may come into equity.*—A married woman cannot come into equity, to protect her interest in slaves, which she claims under a verbal gift, against subsequent execution creditors of the grantor; nor where she claims under a deed of gift, and shows by her bill that the trustee, to whom the legal title was conveyed for her use, has interposed a claim at law.

APPEAL from the Chancery Court at Tuscaloosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 23d September, 1861, by Jared E. F. Kirksey, and Elizabeth Kirksey, his wife, against Stewart & Lucius, Robert H. Patterson, John W. Womack, and others. Its material allegations may be thus stated: Mrs. Kirksey was the daughter of said Robert H. Patterson, and married said Jared E. F. Kirksey on the 5th October, 1858. In 1836, while said Elizabeth was a minor, and living with her father, he gave her verbally a negro woman, by name Mahala, who, with her increase since that time, is the subject of this suit. On the 24th March, 1840, Patterson conveyed said slaves, with others, to John W. Womack as trustee, for the use and benefit of the said Elizabeth and her two sisters; the deed containing the following provisions: "To have and to hold the said slaves, together with all their future increase, to the said John W. Womack, for the space of twenty years from the date of these presents; the said slaves to remain on the premises, in my possession, and with the children, as they now do; and the annual proceeds and profits of

their labor and industry to be applied by said Womack to the support and proper education of my said children, he receiving annually the said proceeds and profits, and applying them to the said purpose; and, after the lapse of the said twenty years, the said slaves to be given up, and equally divided by the said trustee among my said children, and among my other children which may be born to me by my present wife; and the said slaves then to be and remain the property of my said children, and to the children which may be born by and to them, forever." On the 1st March, 1859, Stewart & Lucius became accommodation endorsers for said Patterson, on several bills of exchange and notes; and to secure and indemnify them against liability on their said endorsements, Patterson conveyed a tract of land to one Jennings as trustee, with power to sell, and apply the proceeds to the payment of said bills and notes. At the time Stewart & Lucius assumed this liability for Patterson, they had notice of the prior verbal gift of the slaves to Mrs. Kirksey, and the deed of trust on the land afforded them ample indemnity; yet, having obtained judgments against Patterson, in September, 1860, for the amounts which they had paid on their accommodation endorsements for him, they had their executions levied on said slaves. On the 27th March, 1860, Womack instituted an action of detinue against Patterson to recover the slaves; and on the 31st October, 1860, the executions of Stewart & Lucius having been levied on the slaves, he interposed a claim, and gave bond for a trial of the right of property under the statute; and both of these suits were pending when the bill was filed.

The prayer of the bill was, "that the said slaves may be set apart and decreed to be the property of said Elizabeth, by virtue of said verbal gift from her father;" that Stewart & Lucius "be perpetually enjoined from proceedings to subject said slaves to the satisfaction of their said executions;" that Womack "be perpetually enjoined from seeking to recover the possession of said slaves under said deed to him;" and, if the verbal gift of the slaves should be

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held invalid, that Stewart & Lucius "be enjoined from proceeding to subject said slaves to the satisfaction of their executions, until they have first exhausted their remedy under said deed of trust on said land."

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

VAN HOOSE & POWELL, for appellants.

E. W. PECK, *contra*.

STONE, J.—No question can arise in this case on the doctrine of marshalling securities. If the female complainant has any right to the slaves in controversy, it rests either on the alleged gift by Mr. Patterson, her father, made in 1836, or on the trust deed executed by Mr. Patterson to Mr. Womack in 1840. If either of these alleged titles be worth anything, it must prevail over the attempt of Stewart & Lucius to subject the property to the payment of Mr. Patterson's debt, contracted many years afterwards. The claim of the complainant is not an alleged lien, but a title to the property; either an absolute title, that must prevail over all others, or a groundless pretense. Such a case furnishes none of the ingredients for a bill to marshal securities.—Willard's Equity, 337; 1 Story's Equity, § 633.

[2.] So far as the bill rests on the alleged gift to Mrs. Kirksey, the remedy at law is simple, adequate, and complete. In the other aspect of the case—that which relies on the trust deed executed to Mr. Womack—the bill not only fails to allege that Mr. Womack refuses to assert his title at law, but, on the contrary, charges positively that he has interposed his claim at law, which is now pending and undetermined. In such case, a beneficiary under the deed has no excuse for invoking the powers of the chancery court.—*Rainey v. Rainey*, 35 Ala. 282; *Calhoun v. Cozzens*, 3 Ala. 498.

The decree of the chancellor is affirmed.

SMITH vs. KENNARD'S EXECUTOR.

[BILL IN EQUITY BY LEGATEES AGAINST EXECUTOR, FOR RECOVERY OF LEGACIES, ACCOUNT, &c.]

1. *Power and duty of executor, under will, in supporting and educating minor children.*—Where the testator directed his estate to be kept together, and his slaves to be hired out by his executor, until his youngest child attained full age or married, when the slaves were to be sold for general distribution among all his children; bequeathed to each child a pecuniary legacy, to be paid as they severally arrived at full age or married; set apart the hire of the slaves, with the proceeds of the sale of certain real estate directed to be sold, as a fund for the payment of the legacies; and added, "It is my wish, that my minor children be educated and supported out of the same fund that their legacies are to be raised out of,"—*held*, that the executor, although he was not appointed guardian of the minor children, was authorized to disburse from the proper fund whatever might be necessary for their support and education.
2. *Marshalling assets among legatees.*—Where the expenses of supporting and educating minor children are charged exclusively upon a specific fund, upon which certain pecuniary legacies are also charged, but the latter are not limited to that specific fund, a court of equity will, if necessary, so marshal the securities as to give to the former charge a priority of payment out of the specific fund.
3. *Liability of executor for interest.*—An executor will not be charged with compound interest, on the final settlement of his accounts in equity, unless it appears that he has been guilty of such gross neglect in the execution of the trust as to be evidence of a corrupt intention.
4. *Compensation of executor.*—To deprive an executor of all right to compensation, it must appear that he has been guilty of gross negligence, or willful default, resulting in injury to the estate.
5. *Solicitor's fees, and costs.*—In this case, (bill filed by legatees against executor, for recovery of legacies, account and settlement,) it appearing that the protracted litigation was caused by the equal fault of both parties, one half of the executor's counsel fees, and one half of the costs, were imposed upon the executor individually, and the other half ordered to be paid out of the trust fund.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed, in September, 1840, by Silas M. Smith and wife, with others, claiming as legatees under the will of James J. Kennard, deceased, against

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Henry King, the executor, and the sureties on his several official bonds ; and sought a recovery of the complainants' legacies, an account, and settlement of the estate. The testator died in Madison county, the place of his residence, in October, 1824; and his last will and testament, of which he appointed Henry King and Stephen King the executors, was there admitted to probate soon after his death. After devising and bequeathing to his wife, during life or widowhood, the tract of land on which he resided, several slaves, certain household and kitchen furniture, plantation tools, &c., the will contained the following clauses: "It is my desire that, after the death of my wife, the quarter-section of land I lent her during her life be sold, and all the rest of the property which I lent her. I give to my son Joseph Kennard \$400," together with some cattle, hogs, &c. "I give to my daughter Nancy M. Winfrey all the property that I have heretofore given her, to her and her heirs forever. I give to my daughter Penelope C. Blackman all the property which I have heretofore given her, to her and her heirs forever. All the rest of my children, viz., Charles H., Polly G., Adeline P., James M., Nathaniel W., Eleanor E., George M., and Louisa C. Kennard—it is my desire, that as they arrive at lawful age, or marry, to have \$525; and likewise the child or children that my wife is now pregnant with, have the same. It is my desire, that my negroes, Caroline," &c., (specifying them,) "be hired out until my youngest child comes of age or marries, and the money arising therefrom to be applied in the discharging of the legacies to my children; and then to be sold, and equally divided among all my children. It is my desire, that the quarter-section of land adjoining the plantation whereon I now live on the west, and likewise the quarter-section of land where James Blackman now lives, be sold, at one, two, and three years' credit, and the money to be applied in discharging the legacies to my children. It is my wish, that the seven lots which I have in Erie, in the county of Greene, and which John Kennard, as my attorney, has had the management of, be sold, at one, two, and

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three years' credit; and the money which he has collected, and is to collect, be applied to the payment of my debts. The property that is in the hands of Shelby, as my attorney, in the town of Demopolis, in Marengo county, (if not sold,) I wish to be sold, and the proceeds to be applied in discharging the legacies to my children. It is my wish, that my minor children be educated and supported out of the same fund that their legacies are to be raised out of. I wish my crop of cotton to be sold, and the proceeds to go in paying my debts. I give my shot gun to my son Charles. All the rest and residue of my estate, not heretofore given away, I desire to be sold by my executors, and the proceeds to be applied in the same manner as money arising from other sales."

Henry King alone qualified as executor. The testator's widow died in 1834. His youngest child married in 1838. Several of the children died before the bill was filed, and their legal representatives were made parties to the suit; and there were also several deaths during the progress of the suit. Some of the children purchased property at the executor's sale, in 1839, and gave their notes, with sureties, for the purchase-money. On some of these notes, the executor had instituted suits, and obtained judgments; which judgments the bill sought to enjoin, and to set off against them the several amounts due to the complainants under the will.

The executor filed his answer to the bill in June, 1841; exhibiting an account of his receipts and disbursements, sales of property, &c.; alleging his inability to have made an earlier settlement by the failure of the complainants, whom he had sued, to pay their notes for the purchase of property, and their refusal to let the amount due on their notes go in part payment of their interests in the estate; and demurring to the bill, for multifariousness, for misjoinder of parties, for want of equity, and because the complainants had a complete remedy at law.

At the November term, 1841, the matters of account were referred to the master, who made his report to the

ensuing May term, 1842. The defendant King excepted to that portion of the report which charged him with interest on the funds in his hands, but the chancellor overruled his exceptions; and in May, 1848, he filed an amended answer, under oath, in which he alleged that he had never applied any part of the trust funds to his own private use. In November, 1848, King filed a cross bill, alleging the payment of various legacies, and asking the benefit of all such payments; and most of these payments were admitted in the answers to the cross bill. In January, 1853, King paid into court, under an order, three thousand dollars, the sum admitted by him to be remaining in his hands; and the money was loaned out by the master until the final disposition of the cause. Several references to the register were made pending the suit, and several accounts were stated by him, to which numerous exceptions were reserved by both parties. The cause was submitted for final decree, on pleadings and proof, at the June term, 1857; when the chancellor ordered distribution of the funds in court, after payment of the costs of suit and a fee to the executor's solicitor, among the several legatees whose legacies had not been previously paid.

The appeal is sued out by the complainants. The errors assigned are—1st, the allowance of credits to the executor for disbursements made by him for the support and education of the testator's minor children; 2d, the refusal of the chancellor, on exceptions to the master's report, to charge the executor with compound interest, or to make annual rests in stating the account against him; 3d, the allowance of commissions to the executor; 4th, the order for the payment of the executor's solicitor's fee out of the funds in court; and, 5th, the order for the payment of the costs out of the same funds.

JAMES ROBINSON, for appellants.—1. The defendant ought not to have been allowed credits for moneys expended by him in the support and education of the minor children. The education and support of the minors was not a charge

on the estate generally, but a special fund was set apart for that purpose. Moreover, if those disbursements were authorized out of the estate, the executor was not the proper person to make them: he was not the guardian of the children, and had no right to control them, or to superintend their support and education.—*Peyton v. Smith*, 2 Dev. & Bat. Eq. R. 325. Not being guardian, he will not be permitted to blend the two characters.—*Willis v. Willis*, 9 Ala. 334.

2. The defendant ought to have been charged with compound interest. His amended answer, denying on oath that he had used the funds of the estate, was not filed until the lapse of eight years from the commencement of this suit, and after he had been charged with interest in an account stated by the master under an order of the court. In this particular, his amended answer is disproved, both by his own subsequent answers to the interrogatories propounded to him by the complainants, in which he admits that he had blended the trust funds with his own, and could not at any time distinguish them; and by the deposition of the register, who testifies, that the money deposited by him in court consisted, for the most part, of notes issued by banks which were chartered long after he had collected the funds belonging to the estate. His liability for compound interest, under all the circumstances disclosed by the record, is sustained by the following authorities: *Scheffelin v. Stewart*, 1 John. Ch. 620; *Raphael v. Bonham*, 11 Vesey, 103; *Nightingale v. Lawson*, 1 Bro. Ch. 443; *Evertson v. Tappan*, 5 John. Ch. 497; *Manning v. Manning*, 1 John. Ch. 535; *Dunscomb v. Dunscomb*, 1 John. Ch. 507; *Powell v. Powell*, 10 Ala. 900; *Moseley v. Ware*, 11 Vesey, 581; *Myers v. Myers*, 2 McCord's Ch. 266; *Jones v. Foxall*, 13 Eng. L. & Eq. 142; *Whiting v. Walker*, 2 B. Mon. 262; 2 Story's Equity, §§ 1277-8.

3. The record makes out a clear case of willful default and gross negligence on the part of the executor, which deprives him of all right to compensation.—*Gould v. Hayes*, 19 Ala. 459; *Powell v. Powell*, 10 Ala. 914.

4. The litigation was caused by the default of the executor, and he ought to have been taxed with the costs; instead of which, the chancellor imposed all the costs, and even the fees of the defendant's solicitors, on the trust fund.—2 Williams on Executors, (2d Amer. ed.) 1463-4; 1 Vesey, 294; 11 Vesey, 58, 581; *Newton v. Bennett*, 1 Bro. Ch. 362; *Manning v. Manning*, 1 John. Ch. 535; 1 Ired. Eq. 326; 17 Eng. L. & Eq. 500; 19 *ib.* 279; 4 Hen. & M. 431; 2 *ib.* 26; Rice's Eq. 51; 7 Barr, 455; 1 Strob. Eq. 394; *Bendall v. Bendall*, 24 Ala. 306; *Pearson v. Darlington*, 32 Ala. 273.

STONE, J.—The will of Mr. Kennard, out of which this litigation has grown, imposed active duties and trusts on his executors, to continue until the youngest child should come of age, or marry. Among these active duties was the direction to hire out the slaves, Caroline, Charlotte, Liza, Dave, Big Eady, Little Eady, Rachel, and Amanda; and when that event—the majority or marriage of his youngest child—should come to pass, then the executors were directed to sell said slaves for general distribution among all of testator's children. The will also gave to each of the minor children, of whom there were several, and one in *ventre sa mere*, a pecuniary legacy of \$525, to be paid as they severally arrived at age, or married. The will then set apart the hire of said slaves, the proceeds of two quarter-sections of land ordered to be sold, and the proceeds of certain property in the town of Demopolis, for the payment of the legacies to testator's children. After this, the will adds: "It is my wish, that my minor children be educated and supported out of the same fund that their legacies are to be raised out of."

[1.] It is objected against the allowance made to the executor, for moneys paid by him in the education and support of the minor children, that the will did not constitute him guardian of such minors, and therefore he was not the proper person to make such disbursements. The will of Mr. Kennard clearly shows, that it was his intention and

direction that the bulk of his estate should be kept together, until his youngest child came of age or married. During all that time, most of his estate was, and would be, necessarily, in the hands of the executor. The minor children could claim no part of their legacy, either under the special or residuary clause, until they severally attained to lawful age or married; save their education and support, for which the will made provision. Under these circumstances, we think it clear, that the executor was fully authorized to disburse from the proper fund whatever might be necessary for the education and support of the minors. The direction for the education and support of the children was as much a bequest, as was any other provision of the will; and the duty it enjoined was purely executorial.—See *Pickens v. Pickens*, 35 Ala. 442.

[2.] It is further objected, that the disbursements made by the executor in the education and support of the minor children, should not have been allowed as general credits to him in his final settlement, but should have been allowed only out of the special fund on which they were charged in the bequest. We deem it unnecessary to inquire into the question, whether the education and support of the minor children was a charge, limited to the three funds specified in the will—namely, the hire of the slaves, the sale of the two quarter-sections of land, and the sale of the property in Demopolis. If such be the case, it cannot change the result in this case, as we will now proceed to show. The pecuniary legacies, although charged on these three funds, are not limited to them for payment. Should those funds fall short in the payment of the legacies, it is obvious the deficit must be made up from the general assets. The pecuniary legacies, then, can assert no preference or priority of payment over the expenses for education and support; but, if the latter be limited to those funds, and cannot be paid out of the general assets, then equity will marshal the securities, so as to give to the expenses for education and support a prior claim of payment.—*Marine Dock & Mutual Insurance Company v. Huder*, 35 Ala. 713;

Chapman v. Hamilton, 19 Ala. 121 ; *Carter v. Balfour*, *ib.* 814 ; *Lightfoot v. Lightfoot*, 27 Ala. 351. It being shown, then, that, on this supposition, the charge for education and support would have a prior claim on these funds for payment, it only remains to inquire, whether the hire of the slaves, the sale of the two quarter-sections of land, and the sale of the property in Demopolis, yielded a sufficient fund for the payment. Looking into the register's report, we find they yielded a considerable surplus, which passed into the fund for the payment of the pecuniary legacies, and the several interests under the residuary clause. It requires, then, no elaboration to show, that the solution of the question propounded above becomes unimportant.

[3.] The other questions raised by the assignments of error relate to the rule of computing interest against the executor, his right to compensation in the shape of commissions, the payment of his solicitor's fees out of the trust fund, and the question of costs in this suit. On none of these questions do we deem it necessary or proper that we should travel out of our own decisions, in search of the rule. The doctrine on these subjects is settled in Alabama.

We hold, that Mr. King was properly chargeable with interest, and that the chancellor did right in refusing to charge him with compound interest. He was negligent, but does not appear to have been "guilty of such gross neglect in the execution of the trust, as to be evidence of a corrupt intention."—*Bryant v. Craig*, 12 Ala. 354 ; *Pearson v. Darrington*, 32 Ala. 227, 268.

[4.] So, Mr. King was entitled to commissions as executor. He is not shown to have been guilty of "gross negligence, or willful default." Under our decisions, the personal representative, to deprive himself of all right to compensation, must have been guilty of gross negligence, or willful default, resulting in injury to the estate.—*Powell v. Powell*, 10 Ala. 914 ; *Gould v. Hayes*, 19 Ala. 438 ; *Stewart v. Stewart*, 31 Ala. 207, 217 ; *Pearson v. Darrington*, 32 Ala. 227, 270 ; *Emanuel v. Draughan*, 14 Ala. 302.

[5.] The executor is also entitled to have his solicitor's

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fees paid out of the trust fund, unless the litigation was brought about by his own fault or laches.—*Bendall v. Bendall*, 24 Ala. 295 ; *Williamson v. Mason*, 23 Ala. 488 ; *Stewart v. Stewart*, 31 Ala. 207, 218 ; *Pearson v. Darrington*, 32 Ala. 227, 273 ; *Pickens v. Pickens*, 35 Ala. 442 ; *Henderson v. Simmons*, 33 Ala. 291. Under this rule, we hold, that the litigation in this case was, in its extent, caused by the equal fault of the complainants and Mr. King. We, therefore, divide both the defendant King's solicitor's fees, and the costs in the court below. In other words, half the costs in the court below must be taxed against Mr. King ; and the other half of the costs, and half the solicitor's fees, must be paid out of the fund deposited with the register.

Let the costs of this appeal be paid equally by Mr. King, and by the adult male appellants.

Reversed and remanded.

NOTE BY REPORTER.—This case was decided at the June term, 1860, but the record was for some time mislaid.

RAISLER vs. SPRINGER.

[TRESPASS FOR INJURIES TO PERSONAL PROPERTY.]

1. *Admissibility of agent's acts and declarations as evidence against principal.*—A person who employs an agent to seize the personal property of another without authority, is responsible to the injured party equally with the agent, although not actually present when the trespass was committed ; and the acts and declarations of the agent, in the performance of the unlawful service, are competent evidence against his principal.
2. *To what witness may testify.*—A witness may testify, that a seizure of property by an officer, without lawful authority, "was made in an offensive and insulting manner."

APPEAL from the Circuit Court of Madison.

Tried before the Hon. S. D. HALE.

THIS action was brought by Charles W. Raisler, against Josiah Springer, to recover damages "for the unlawful taking of the following goods and chattels, the property of the plaintiff, to-wit: one buggy, of the value of one hundred dollars, and four thousand feet of plank;" and was commenced on the 1st February, 1858. The record does not show what pleas were filed. On the trial, three several bills of exceptions were reserved, two by the plaintiff, and one by the defendant; and the plaintiff's second bill purports to set out all the evidence. The seizure of the property, which constituted the alleged trespass, was made by one Vest, a constable. The defendant was not present when the seizure was made; but the plaintiff proved his subsequent admissions "that he had told the constable to levy on the property." "To show malice and willful wrong on the part of the defendant, the plaintiff offered to prove, that the seizure of said property by Vest was made in an offensive and insulting manner. The court refused to admit this evidence, because it was the statement of an opinion by the witness, and not of facts showing how the act was done." This ruling of the court, to which the plaintiff reserved an exception, with other matters which require no particular notice, is now assigned as error.

J. W. SHEPHERD, for appellant.

JAMES ROBINSON, *contra*.

R. W. WALKER, J.—The appellant's bill of exceptions purports to set out all of the evidence, and presents the defendant in the attitude of a party who employs an agent to seize the property of another, without any authority for so doing. One who thus procures an illegal act to be done by another, is a co-trespasser with the party employed to perpetrate the wrong, and is equally responsible with him to the person injured, although not actually present when the trespass is committed; and the acts and declarations of the agent, in performing such unlawful service, are competent evidence against his principal. It is a familiar princi-

ple, applicable alike in civil and in criminal cases, that where several persons combine for the same illegal purpose, anything said or done by one of the confederates, in the prosecution of the common design, is, in legal contemplation, the act of all.—*Abney v. Kingsland*, 10 Ala. 361 ; *Johnson v. State*, 29 Ala. 62. It is upon this principle that, if two persons are guilty of a joint trespass, and one of them, in the commission of it, does acts which would authorize the jury to give exemplary damages against him, the other is liable to the same extent.—*Hair v. Little*, 28 Ala. 247 ; *Layman v. Hendrix*, 1 Ala. 212. The manner in which an act, constituting a trespass, is committed, whether offensive and insulting, or otherwise, is inseparably connected with, and forms, indeed, a part of the act itself ; and, upon the principles just laid down, it must be competent evidence against the party by whose direction the trespass is committed, as well as against the agent by whose hand the injury is actually inflicted.—See, further, *McClung's Executors v. Spotswood* 19 Ala. 165 ; *Nelson v. Cook*, 19 Ill. 440 ; *Parkerson v. Wightman*, 4 Strob. L. 363.

[2.] The court rejected the evidence, showing that the seizure of the property was made by Vest in “an offensive and insulting manner,” on the ground that it was the statement of an opinion, or legal conclusion. In this, we think, the court erred. The manner in which an act is done—whether rude and offensive, or kind and pleasant—is a matter of fact, open to the observation of the senses, to which a witness may legally testify. In *Carroll v. State*, 23 Ala. 28, the statement of a witness that, in replying to a certain question, the prisoner’s “manner was short,” was held to be admissible.

As the defendant has made no cross assignment of errors, the questions raised by the bill of exceptions taken by him on the trial are not now before us. Whether the judgment and execution referred to in that bill of exceptions are competent evidence for the defendant ; and, if so, whether, in case of the introduction of both, or either of them, in evidence, the rule which makes the act and decla-

rations of one co-trespasser evidence against another, could be considered applicable to this case, are matters on which we must not be understood as having expressed an opinion.

As the rulings of the circuit court are in conflict with the principles we have laid down, its judgment must be reversed, and the cause remanded.

RUTLEDGE'S ADM'R. vs. TOWNSEND, CRANE & CO.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Sufficiency of consideration.*—Where a third person joins with a debtor in the execution of a promissory note, payable to the creditor, and to be delivered as collateral security for the original indebtedness, the note is without consideration as to him; but a valid promise by the debtor, contemporaneously made, to indemnify him against liability on the note, forms a sufficient consideration to support the note as to the surety.
2. *Certainty requisite in contract.*—A promise by the principal to his surety, made to induce the latter to join with him in the execution of a promissory note, to be delivered to the creditor as collateral security for the original debt, on which the surety was not bound, to the effect that he should be "*amply secured*" against liability on the note, is sufficiently definite and certain to support an action at law, if not performed within a reasonable time before the maturity of the note.
3. *Measure of damages.*—In an action against the maker of a promissory note, which was made and delivered to the plaintiff as collateral security for the debt of another, on which the defendant was not bound, if the plaintiff has received partial satisfaction of the original debt, he is only entitled to recover the balance unpaid.
4. *Satisfaction of execution.*—A sale of property by the sheriff, under the levy of an execution, is, *pro tanto*, a satisfaction of the execution.
5. *Application of money on executions or attachments; presumed existence of common law elsewhere.*—At common law, if several executions or attachments, having equal liens, were levied on the same property, and the proceeds of sale were not sufficient to pay all the debts in full, the funds were divided equally among the several claims, irrespective of their amount; and if the sum thus distributed to any one creditor was more than sufficient to satisfy his debt in full, the surplus was equally apportioned among the other creditors; and this rule of the common law will, in the absence of proof to the contrary, be presumed to prevail in another State.

Rutledge's Adm'r v. Townsend, Crane & Co.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the appellees, against the administrator of Charles Rutledge, deceased, and was founded on three promissory notes, which were executed by said Rutledge, jointly with John M. Milner and Martin W. Smith, dated February 5, 1855, and payable to the order of the plaintiffs; one for \$2558 79, payable on the 1st May next after date; another, for \$2768 77, payable on the 1st January next after date; and the third, for \$1050 47, payable on the 1st March, 1856. On the trial, as the bill of exceptions shows, after the plaintiffs had read in evidence the notes on which the suit was founded, the defendant introduced as a witness said M. W. Smith, who was not sued in this action, and who testified, that at the time of the execution of said notes, one of the plaintiffs executed and delivered to him three receipts for them, which had been lost, but copies of which he produced. Each of these receipts, after setting out a copy of one of the notes, acknowledged the receipt of the original "as collateral security for the payment" of certain notes and accounts, which were particularly described, due and owing to Townsend, Crane & Co., some by Milner & Smith, and the others by Milner, Whitlow & Co.; and were signed by Townsend, Crane & Co. "Said witness stated, also, that there was no other consideration for said notes than that shown in said receipts. On cross examination, he was asked, whether or not there was a consideration as between himself and Milner and said Rutledge; to which he answered, that Milner promised Rutledge, if he would sign said notes as surety, that he should be amply secured, but that it was not stated how he should be secured; and there was no evidence that he was ever secured in any way. Said witness was further asked, on cross examination, if the two accounts mentioned in said receipts were not included in said notes, and were not thereby settled and cancelled; to which he answered, that they were

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so included, and that he considered them settled, but nothing was said about it at the time; that the accounts were not receipted, within his knowledge, but they had never been collected or demanded. The defendant objected to the statement of the witness, as to what he 'considered,' and the court sustained the objection. Said witness stated, also, that said Rutledge only signed said notes as surety."

The defendant then read in evidence a transcript, properly certified, from the records of the inferior court of Clark county, Georgia, showing the proceedings there had in an attachment suit, wherein Townsend, Crane & Co. were plaintiffs, and Milner, Whitlow & Co. were defendants. The suit was founded on the notes and accounts described in one of the receipts above mentioned as being due from Milner, Whitlow & Co. to Townsend, Crane & Co. The attachment was sued out on the 10th March, 1855, and was levied on four slaves as the property of W. A. Whitlow. Judgment was rendered for the plaintiffs, on the 22d October, 1855, for \$4,789 99. The transcript next contains an entry without date, which states the name of the case, with two other cases against the same defendants, (each case being described as "Attachment, &c., in Clark inferior court,") and then proceeds as follows: "It appearing to the court that the above attachments were levied on sundry negroes, as the property of W. A. Whitlow, one of the defendants, which negroes are now in the custody of the sheriff; and the above-named plaintiffs having made out and established their demands, and placed the same in judgment of this court,—it is ordered by the court, that the sheriff of said county proceed to sell said property according to the statute in such case provided, and that he pay over the same according to law, in the clerk's office of this court, to abide the order and judgment of this court at the next term thereof, in satisfaction of said attachments." The last entry in the transcript is signed by the sheriff, and states, that the property was sold, under the above order of the court, on the 1st Tuesday in December,

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1855, and that the proceeds of sale amounted to \$2,210; "which sum," it continues, "is now in hand, and subject to the distribution of the honorable inferior court, less costs and expenses of sale."

"This being all the evidence in the cause, and there being no conflict in the testimony, the court charged the jury, at the request of the plaintiffs, that, if they believed the evidence, they ought to find for the plaintiffs, for the full amount of the three notes sued on; to which charge the defendant excepted," and which he now assigns as error.

WM. P. CHILTON, with whom were RICHARDS & FALKNER, for appellant.—1. No person can be held to pay the debt of another, unless his promise to do so is in writing, and founded on valuable consideration. The defendant's promise here was in writing, but was without consideration. The notes were given and accepted as collateral security for pre-existing debts, on which Rutledge was in no wise bound. No time was given by the creditor, no security relinquished, no debt extinguished; and no injury or inconvenience was suffered. Such a promise will not support an action.—*Jackson v. Jackson*, 7 Ala. 792; *Hester v. Wesson*, 6 Ala. 413; *Williams v. Sims*, 22 Ala. 512; *Nesbit v. Bradford*, 6 Ala. 746; *Miller & Cobb v. McIntyre*, 9 Ala. 638; *Thompson v. Hall*, 16 Ala. 204; *Files v. McLeod*, 14 Ala. 611; *Beall & Co. v. Ridgeway*, 18 Ala. 117; Theobald on Principal and Surety, 6, 7.

2. Milner's promise that, if Rutledge would sign the notes, he should be "amply secured," was too vague and indefinite to support an action at law, or to be specifically enforced in equity. A promise of indemnity, moreover, is nothing more than the law would imply, and forms no valid consideration.—*Crowhurst v. Laverack*, 16 Eng. Law & Eq. 497; *Harris v. Watson*, Peake's R. 72; *Stylk v. Myrick*, 2 Camp. 317; *Callagan v. Hallett*, 1 Caines' R. 104; *Willis v. Peckham*, 1 Brod. & Bing. 515; 1 Metcalf, 276. Besides, there was no privity between Townsend, Crane & Co. and Rutledge, so far as this promise of Milner was

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concerned. There is not, to use the language of the court in *Price v. Easton*, (4 Barn. & Ad. 433,) "any evidence that the creditor ever heard of this promise." See, also, *Crow v. Rodgers*, 1 Stra. 592; Buller's N. P. 134; Theobald on Principal and Surety, 6, 7. Suppose Rutledge had sued Milner on this promise; would it not have been a complete defense, that the notes imposed no liability on him?

3. The court committed a manifest error, in allowing the plaintiffs to recover the full amount of the notes, when the transcript of the Georgia record showed a partial satisfaction of the original debt, which these notes were given to secure. The levy and sale of property, under execution or attachment, is, *pro tanto*, a satisfaction of the debt; and if the money was taken from the plaintiffs under older liens, or in any other way, the *onus* was on them to show that fact.

GOLDTHWAITE, RICE & SEMPLE, *contra*.—1. The notes imported a consideration, and the *onus* of disproving that legal presumption was on the defendant. The fact that one of the joint makers of a note signed it without consideration as between him and the payee, and at the request of another joint maker, is not sufficient to destroy the presumption of consideration arising from the note itself: it must be shown, also, that there was no consideration moving between the payee and any of the other joint makers.—*Kinsman v. Birdsall*, 2 E. D. Smith, (N. Y.) 395; 1 Comyn's Digest, *Action on the case*, B. 12. The fact that the notes were given as collateral security for antecedent debts, is no defense to the action. No consideration is required, as between the surety and the creditor, to give validity to a note which is given for the debt of a third person, and for the benefit of such third person.—Chitty on Contracts, 453; *Lord v. Ocean Bank*, 20 Penn. St. R. 384; *Sison v. Kidman*, 3 Man. & Gr. 810; *Lathrop v. Morris*, 5 Sandf. 7; *Wheeler v. Slocumb*, 16 Pick. 52; *Gillet v. Ballou*, 29 Vermont, 296; *Loosemore v. Radford*, 9 Mees. & Wels. 657; *Morley v. Boothby*, 3 Bing. 107; *Caillenx v.*

Hall, 1 E. D. Smith, 5; *Bailey v. Croft*, 4 Taunton, 611; *Watkins v. James*, 5 Jones' Law R. 105; *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Webb v. Rhodes*, *ib.* 734; *Boehm v. Campbell*, 3 Moore, 15; *Pace v. Marsh*, 1 Bing. 216; *DeWolf v. Raband*, 1 Peters, 500; *Carter v. Black*, 4 Dev. & Bat. 425; *Evans v. Keeland*, 9 Ala. 42.

2. Milner's promise to secure Rutledge, made to induce the latter to sign the notes as his surety, is sufficient to uphold the notes as to Rutledge, if there was no other consideration. This express promise to secure is different from the promise to reimburse, which the law would imply. It was made before the relation of principal and surety existed between the parties, and to induce Rutledge to assume the relation of surety. It contemplated immediate performance, or, at least, within a reasonable time. That a court of equity would specifically enforce such a promise, see 2 Story's Equity, §§ 850, 851, 730, and notes; Newland on Contracts, 93; *Ranelagh v. Hayes*, 1 Vernon, 189; *Pember v. Mathers*, 1 Bro. C. C. 52; *Champion v. Brown*, 6 Johns. Ch. 398; *Chamberlain v. Blue*, 6 Blackf. 491; *Walton v. Coulson*, 1 McLean, 120. That the promise is sufficiently specific, and not void for uncertainty, see *Brown v. Adams*, 1 Stew. 51; *Mobile Marine Dock and Mutual Insurance Company v. McMillan*, 31 Ala. 711; *Fitzpatrick v. Hanrick*, 11 Ala. 783; *Prater v. Miller*, 3 Hawks, 628.

3. A judgment recovered is, until satisfied, but a mere security for the original cause of action, and cannot operate to change any other concurrent remedy which the plaintiff may have.—*Drake v. Mitchell*, 3 East, 252; *Spivey v. Morris*, 18 Ala. 254; *Leavitt v. Smith*, 7 Ala. 182; *Blann v. Crocheron*, 20 Ala. 320. The Georgia record showed no satisfaction, in whole or in part, of the original debt.

A. J. WALKER, C. J.—The evidence in this case conducted to show, that Rutledge, the appellant's intestate, joined in the execution of three promissory notes, to be delivered as collateral security for pre-existing debts, for

which he was in no wise liable; and that those notes were made payable to the creditors whose debts they were designed to secure. It seems, also, from the evidence, that the notes given as collateral security were signed by two others, one of whom was liable upon all the debts intended to be secured, and the other liable upon a part of them; and the evidence conduced to show, that there was no consideration for the new notes, unless it is shown by those facts. The question presented by the charge of the court is, whether a pre-existing indebtedness of one or more of the makers of a note is a consideration to support the note as to one not liable upon the original indebtedness, the note being given as collateral security for the existing debt.

Where one thus makes a promise to pay the pre-existing debt of another, for the purpose of its security, there is no element, either of detriment to the promisee, or of benefit to the promisor; and upon principle it seems clear, that there is no consideration. It is the case of a promise made for a consideration wholly past, and not founded upon the request of the promisor; and can not be distinguished, in principle, from the case where a third person subscribes to an existing note, or guaranties the payment of a subsisting debt, or where an administrator executes his note for a debt of the intestate; in *all of* which cases it is held, that there is no consideration.—*Jackson v. Jackson*, 7 Ala. 792; 1 Parsons on Contracts, 391; Chitty on Contracts, 53, 61, 62, 426; *Hester v. Wesson*, 6 Ala. 415; *Williams v. Sims*, 22 Ala. 512.

We accordingly find, as the principle would lead us to expect, numerous adjudications, that the promise to pay the pre-existing debt of another, founded upon no other consideration than the debt, no matter what form it may assume, is *nudum pactum*.—*Leonard v. Verdenburgh*, 8 Johns. 29; *Clark v. Small*, 6 Yerger, 418; *Commercial Bank v. Norton*, 1 Hill, 501; *Rix v. Adams & Throop*, 9 Vermont, 233; *Littlefield v. Shee*, 2 Barn. & Ad. 811; *Meyer v. Haworth*, 8 Ad. & El. 467; *Bates v. Sturges*, 2 Moore & Scott, 172; (28 E. C. L. 264;) *French v. French*,

2 M. & G. 644 ; (40 E. C. L. 555;) *Russell v. Beck*, 11 Vermont, 166 ; *Barker v. Bucklin*, 2 Denio, 45 ; *Gilman v. Kibler*, 5 Humph. 19 ; *Hopkins v. Logan*, 5 Mees. & W. 241 ; *Deeson v. Gridley*, 15 C. B. 295 ; 1 Amer. Leading Cases, (Hare & Wallace's notes,) 146 ; Chitty on Contracts, 53 ; *Salmon v. Brown*, 6 Blackf. 347 ; *Blunt v. Boyd*, 3 Barb. S. C. R. 209.

The difficulty in this case is not in ascertaining the true principle which must govern it, or in finding authorities to sustain it ; but in harmonizing with it adjudged cases, which the industrious search of counsel has been able to produce from an extensive library. The case of *Sison v. Tidman*, (3 Man. & Gr. 810,) was this : The defendant pleaded, that the note sued upon was given by him and another, for the security of a certain sum due by the other maker, and "that the defendant never had any value or consideration for the note." The plea was held insufficient. A careful examination of the report of the case will show, that it is not opposed to the principle above announced. The note imported a consideration, and the *onus* of showing the want of consideration was upon the defendant. The plea only alleged, that the defendant never had any value or consideration ; while a simultaneous benefit to the principal debtor, such as a valid agreement for forbearance to sue, would have constituted a sufficient consideration, and such fact may have existed consistently with everything alleged in the plea. So, the decision in *Kinsman v. Birdsall*, 2 E. D. Smith, (N. Y.) 395, rests upon the same principle, and only asserts, that proof, negating the reception of a consideration by him who joins with a debtor in the execution of a promissory note, is insufficient to sustain the defense of a want of consideration.

Walker v. Rostrow, 9 M. & W. 411, was a case in which a tripartite arrangement was made, between a principal, his agent, and a creditor of the principal, that the agent should pay over the money of his principal, when received, on the demand of his principal's creditor ; and it was held, that the creditor could maintain an action against the agent.

This case was obviously unlike the one under consideration. The remark of the court, that the existing debt was a consideration, it will be seen by a close reading of the opinion, has reference to the principal's agreement that his agent should pay over the money to his creditor, and not to the promise of the agent. Certainly, an existing indebtedness is a consideration for a promise by the debtor himself; but whether it is a consideration for a promise by a third person, is altogether a different question. The liability of the agent in *Walker v. Rostrow*, rested upon the consideration of his agency, and of his receiving the money of his principal, and assenting to the transfer of his liability to the creditor.—Addison on Contracts, 945.

An existing indebtedness is a consideration for a promise by a debtor, because a past consideration is sufficient as to the party at whose request, expressed or implied, it was incurred. It is not, however, a consideration as to a third person. An observance of this distinction will show the inapplicability to the question under consideration, of the decisions as to the liability of accommodation makers and acceptors of mercantile instruments.—Chitty on Contracts, 61. Those decisions simply maintain, that the existing debt is a valid consideration as to the debtor; that one who receives such an instrument is a holder for value, and that therefore, by the mercantile law, the defense of a want of consideration can not be made as to him, by an accommodation maker or acceptor. The cases hold, not that there is a consideration, as to the accommodation parties, but that they were precluded from setting up the want of consideration, as to a holder such as is above described. Some of the cases assert the same doctrine, where the instrument is transferred as collateral security; but the law is otherwise in this State.—*Lord v. Ocean Bank*, 20 Penn. St. R. 384; Story on Bills, 212, § 183; *Lathrop v. Lathrop*, 5 Sandf. (Sup. Ct.) R. 7; *Grandin v. LeRoy*, 2 Paige's Ch. R. 509; *Swift v. Tyson*, 16 Peters, 1; *Fenouille v. Hamilton*, 35 Ala. 319. The consideration in the entire class of cases last noticed, for the transfer of the instrument, and

not for the making and acceptance of it, was the point decided.

It is well established, that when a promissory note is given for a subsisting debt, and the note is payable at a future day, the remedy upon the original debt is suspended; and that suspension is a consideration for the new promise. Addison on Contracts, 1117, 1118 ; *Baker v. Walker*, 14 M. & W. 465 ; *Simson v. Lloyd*, 2 C., M. & R. 184. But this principle can not apply in this case, because here the paper is by contract taken as collateral security, and, from the nature of it, such security does not suspend the remedy upon the debt. It is the case of a party's having two securities, the original paper and the collateral ; and he may pursue his remedy upon either, or upon both at the same time.—2 Parsons on Contracts, 198 ; *Emes v. Widowson*, 4 C. & P. 151 ; *Trotter v. Crockett*, 2 Porter, 401.

Without further commenting upon the numerous authorities adduced by the counsel for the appellee, we conclude by saying, that none of them sustain the charge of the court below.

Reversed and remanded.

NOTE BY THE REPORTER.—The foregoing opinion was delivered at the June term, 1861 ; but a rehearing was afterwards granted, and the cause was held under advisement until the present term, when the following opinion was delivered :

STONE, J.—The parties liable on the original debts of Milner & Smith, and Milner, Whitlow & Co., to Townsend, Crane & Co., are not sued in this action ; and hence we need not inquire, whether these notes are a binding obligation on them, unless that inquiry be material in determining the liability of Mr. Rutledge's administrator.—See the able discussion of that subject in 2 American Leading Cases, Hare & Wallace's notes, pp. 136–8, and the authorities therein collected ; also, *Hopkins v. Logan*, 5 Mees. & Wels. 247.

That which creates some benefit to the party promising, or causes some trouble, injury, inconvenience, prejudice, or detriment to the promisee, is a consideration which will uphold a promise—1 Story on Contracts, § 431; 1 Parsons on Contracts, 358; Addison on Contracts, 942; Chitty on Contracts, 28 *et seq.*; *Violett v. Patton*, 5 Cranch, 142; 1 Com. Digest, 298-9; *Tupper v. Bicknell*, 3 Bing. N. C. 710; Story on Bills, § 183.

The promise of Mr. Rutledge, sued on in this action, was, if the testimony of the witness be believed, a promise to pay the debt of another. The original debt was not extinguished, nor postponed; but the present notes were taken as collateral security to an existing indebtedness. In such case, the general rule is, that there is no element, either of benefit to the promisor, or of detriment to the promisee; and the promise is, therefore, inoperative and void.—*Jackson v. Jackson*, 7 Ala. 791; *Williams v. Sims*, 22 Ala. 512; *Thomason v. Dill*, 30 Ala. 444; Theobald on Principal and Surety, 1 Law Library, 5; *Price v. Easton*, 4 Barn. & Ad. 433; Hare & Wallace's note to *Vadakin v. Loper*, 2 Amer. Leading Cases, pp. 146, 147; *ib.* 126-7; *Alsobrook v. Southerland*, 2 S. & P. 267.

It is contended, that this case is taken out of the operation of the rule above announced, and that the contract is binding, because the promise of the principal makers rests on a valid consideration, to-wit, their antecedent debt to the payees; and that such consideration also upholds the promise of the surety; in other words, that a consideration moving to the principal, will support a promise by principal and surety. This is true, when the consideration is executory, or contemporaneous with the promise, and the latter forms part of the inducement to the former; as, when a sale is made, or injury suffered, or liability incurred; or an agreement that a note with sureties is to be given to secure payment or reimbursement, and such note is consequently given; or, where an existing debt is extinguished, or the day of payment postponed, either expressly, or by implication, in consideration that a note with surety is to be

executed and delivered to the payee, which is accordingly done. In all such cases, the contract is a new, substitutionary one, and is binding. It rests for its consideration, so far as the surety is concerned, on the fact that, without his promise, the contract would not have been consummated. This supplies the element of detriment to the promisee.—2 American Leading Cases, 148; *ib.* 137-8; *Jolley v. Walker*, 26 Ala. 690; *Click v. McAfee*, 7 Porter, 62; *Railey v. Croft*, 4 Taunton, 611; *DeWolf v. Raband*, 1 Peters, 476; *Boehm v. Campbell*, 8 Taunton, 679.

But, in this case, none of these ingredients are found. No benefit was received by the promisor; no inconvenience or detriment sustained by the promisee; no extinguishment or delay of the antecedent debt; but, on the contrary, an express agreement, if the testimony be believed, that the new notes were taken only as collateral to the existing indebtedness. This precludes any presumption that the debt was to be postponed until the maturity of the new notes.—See *Baker v. Walker*, 14 Meeson & Wels. 465.

It is also contended, that the promise of Mr. Rutledge is binding, because of the contemporaneous promise made by Mr. Milner, that if he, Mr. Rutledge, would sign the notes, he should be “*amply secured*.” It was not stated how he should be secured; but it is argued, that this supplies the element of benefit to the promisor, and thus forms a consideration for the promise.

If this promise be simply an agreement by the principal to pay the notes at maturity, or to repay to Mr. Rutledge what he should be required to pay on them, it was nothing more than the duty imposed on him by law, and, hence, would not furnish a consideration to uphold the promise.—See *Callagan v. Hallett*, 1 Caines' Rep. 104; *Stilk v. Myrick*, 2 Camp. 317. But we think it meant, that Mr. Rutledge should be “*amply secured*” before the maturity of the notes; that is, presently, or within a reasonable time. Such being its construction, the question arises, is this promise sufficiently specific to found a right upon, or is it void for uncertainty?

We need not inquire whether this contract could be specifically enforced in equity.—See *Ranelagh v. Hayes*, 1 Ves. 189; *Chamberlain v. Blue*, 6 Blackf. 491; *Champion v. Brown*, 6 Johns. Ch. 398; *Moseley v. Virgin*, 3 Ves. 184; *Casey v. Holmes*, 10 Ala. 777; *Adams Equity*, 351; *Colson v. Thompson*, 2 Wheat. 236; *Harnett v. Yeilding*, 2 Sch. & Lef. 554; *Lord Ormond v. Anderson*, 2 Ball & Beatty, 363; *Tutham v. Platt*, 15 Eng. L. & Eq. 190; *Jackson v. Cacker*, 4 Beav. 59; *Hopcroft v. Hickman*, 2 Sim. & Stu. 130; *Boston & Maine R. R. v. Babcock*, 3 Cush. 228; *King v. Thompson*, 9 Peters, 304; 2 Parsons on Contracts, 525; 2 Phil. Ev. (C. & H. Notes, 4 Am. ed.,) 748–9; *ib.* 785; 1 Greenl. Ev. § 300; *Theobald on Pr. & Surety*, 7; *Jones, dem. Henry, v. Hancock*, 4 Dow. 145; *Hoffman v. Hankey*, 3 Mylne & K. 376; *Pollard v. Maddox*, 28 Ala. 321.

Is the promise in this case sufficiently definite to found an action at law upon? A majority of the court think it is; and that in the event the promisor, Mr. Milner, failed to furnish ample security, within a reasonable time after notice, an action at law could have been maintained for a breach of promise, without alleging or proving special damage, and without waiting for the maturity of the notes on which Mr. Rutledge was surety. We deem it unnecessary to inquire what would have been the measure of Mr. Rutledge's recovery. The promise conferred on him a legal right, which he did not enjoy without it; a right, for the violation of which he could maintain an action; and that legal right, simultaneously conferred, is a valuable consideration to Mr. Rutledge, and upholds his promise made to appellees.—*Brown v. Adams*, 1 Stew. 51. The disproportion between the benefit received, and the liability incurred, is immaterial. The law does not require that the consideration, on which an executory promise rests, shall be adequate. It is enough if it be valuable.—*Shepherd's Digest*, 492, § 70.

It results from what we have said above, that the circuit court rightly instructed the jury to find for plaintiffs, if

they believed the evidence. The court, however, went further, and told that body, "that if they believed the evidence, they ought to find for the plaintiffs, for the full amount of the three notes sued on." In this the court erred. The bill of exceptions informs us that it contains all the evidence. In the record from the inferior court of Clark county, Georgia, it is shown that, in the suit on the original notes, to which those which are the foundation of the present action are collateral security, four slaves were seized under attachment, and were afterwards sold under an order of court issued for that purpose; and that the proceeds of the same, twenty-two hundred dollars, were in the hands of the sheriff, "subject to the distribution of the honorable inferior court, less costs and expenses of sale." This sale and return of the sheriff were made after judgment was rendered in the attachment suit in the State of Georgia, but long before the trial of the present suit in the circuit court. The present record is entirely silent on the subject of the disposition of these funds, further than may be inferred from what is stated above. These facts, unrebutted and unexplained as they are, bring this case directly within the operation of the general rule, which holds that "when property is levied on and sold under an execution, it is a satisfaction of the execution, to the extent of the proceeds of the sale."—See *Niolin v. Hamner*, 22 Ala. 581; *Campbell v. Spence*, 4 Ala. 550; *Moore v. Barclay*, 18 Ala. 672; *Kelly v. Governor*, 14 Ala. 544; *Bondurant v. Buford*, 1 Ala. 159; Crocker on Sheriffs, section 432, and notes.

It is contended, however, that the money realized from the sale of the four slaves can not be regarded as a payment in this case, because, so far as we are informed, the money was not ordered to be paid to the plaintiff; but, on the contrary, the order of the court was, "that the sheriff of said county proceed to sell said property according to the statute in such case provided, and that he pay over the same according to law, in the clerk's office of this court, to abide the order and judgment of this court at the

next term thereof, in satisfaction of said attachments." It is further objected against the allowance of this alleged payment, that, inasmuch as no distribution of the funds is shown to have been ordered by the inferior court of Clarke county, Georgia, and no evidence furnished of the amount of *costs and expenses*, no correct data are furnished, by which the jury could determine the amount of credit to which defendant was entitled.

To this we answer, that the sale by the sheriff divested the title of the property out of the defendants; and this, unrebutted, operates a payment *pro tanto*.—See authorities *supra*, and *People v. Hopson*, 1 Denio, 574. In the second place, the rule of the common law, which, in the absence of proof to the contrary, we must presume prevails in Georgia, is, that where property is simultaneously levied on under two or more executions or attachments, and the property is not of value sufficient to pay and discharge all the debts thus levied, the liens being equal, the money, irrespective of the amounts of the several claims, must be applied equally to the several debts, unless a surplus remains after a full payment of one or more of the claims. In case there be such surplus, that must be applied equally to the balance of the unpaid debts. In other words, that the varying amounts of the debts under which the levies are made, exert no influence in the distribution of the funds, except as to the surplus that may remain after the extinguishment of one or more of the debts.—See Crocker on Sheriffs, § 434; Drake on Attachments, §§ 260-261; *Campbell v. Rodger*, 1 Cow. 215. From this principle it results, that the defendant was, under the most favorable view we can take for the plaintiffs, entitled to a credit for one third of the sum for which the negroes were sold, less the costs and expenses. Perhaps this *prima-facie* view can be overturned; but there is nothing in this record to destroy its effect. We hold, that it was the duty of the plaintiffs, in the attachment suit in Georgia, to have a proper distribution made of the funds raised there; and, unless they show that their share of the pro-

ceeds of the slaves is reduced, or taken away by some paramount lien or liability, they must submit to a proper abatement of their present demands.

It can scarcely be necessary to add that, if the testimony of the witness be believed, a payment, in whole or in part, of the principal debt, is a payment *pro tanto* of the collateral security. This grows out of the fact that the later notes were executed expressly as collateral security to the former set, and are not the evidences of a separate and independent debt.

For the single error above pointed out, the judgment of the circuit court is reversed, and the cause remanded.

CLEMENS vs. PATTERSON.

[MOTION TO DISMISS APPEAL.]

1. *Parties to proceeding for probate of will.*—Although the statute requires that the widow and next of kin shall be notified of proceedings before the probate court for the probate of a will; yet they are not parties to the proceedings, unless they appear and participate therein.
2. *Parties to appeal.*—An appeal from a decree of the probate court, in the matter of the probate of a will, can not be sued out by the next of kin, who, although cited, did not appear and make themselves parties to the proceedings.

APPEAL from the Probate Court of Madison.

WALKER & BRICKELL, with W. P. CHILTON, for appellant.
GOLDTHWAITE, RICE & SEMPLE, *contra*.

A. J. WALKER, C. J.—Benjamin Patterson, as executor, propounded the will of James Clemens, deceased, for probate. The will was propounded by a written petition, which gives the names and residences of the next of kin. Citations were issued to the next of kin resident in the State, and served upon them; and publication was made

as to the non-residents. One of them, Jeremiah Clemens, appeared, and contested the will propounded by Patterson, and set up an older will, upon the ground that the older will had been cancelled, and the younger one executed, when the testator was insane. The younger will propounded by Patterson was set aside, and the older will admitted to probate. An appeal to this court is taken, in the name of all the next of kin, by all of them except Jeremiah Clemens. A motion to dismiss the appeal is made by Jeremiah Clemens, who did not join in taking the appeal, notwithstanding his name was used.

The first position taken in support of the motion to dismiss is, that the next of kin who did not contest the will, are not parties to the proceedings in the probate court, and, therefore, can not appeal. The proceeding for the probate of a will does not take the form of a suit between adverse parties, unless there is a contest, and then only between the proponent and contestants. The widow and next of kin are not summoned "to see proceedings," or witness the probate, upon the supposition of a necessary antagonism to the proponent. They are cited without reference to the actual bearing of their interests, or the existence of any interest in the proceeding. If they were, by a peremptory rule, assigned the position of defendants, they would often be placed in hostility to their real interest, and sometimes be parties to a proceeding in which they were not concerned. Many years ago, this court, in a well considered opinion, in which the practice in courts proceeding according to the civil law was examined, announced a principle, which would, in such proceedings before the probate court as that for the establishment of a will, make the persons required to be cited parties only when they intervened, participated in the *contestatio litis*, or were formally made parties in that court.—*Watson v. May*, 8 Ala. 177. This principle permits the widow and next of kin severally to become parties or not, and to assume position on the one side or the other, as their interests may suggest.

Our examination, which has been as extensive as the books at our command would permit, leads us to the conclusion, that this principle is supported by analogies found in the civil and ecclesiastical law.—Rogers' Ecclesiastical Law, 479, 480, 948, 680, 681 ; *Brittleston v. Clark*, 2 Lee, 248 ; *Hillam v. Walker*, 1 Hag. 71 ; *Chichester v. Donegal*, 1 Addams, 10–16 ; *S. C.*, 3 Phil. 594–595 ; *Montague v. Montague*, 2 Addams, 372 ; *Public Administrator v. Watts*, 1 Paige, 382. It has since been followed by this court, and was distinctly announced in the recent cases of *Blakey v. Blakey*, 33 Ala. 611, and *Allen v. Prater*, 35 Ala. 169 ; and is implied in the argument of the court, in *Deslonde & James v. Darrington*, 29 Ala. 92. See, also, *Gilbert v. Gilbert*, 22 Ala. 229.

The same principle is involved and recognized, in those cases in which appeals have been taken, from decrees of the probate court establishing wills, by contestants, without joining all the persons who had been cited.—*Coleman v. Robertson*, 17 Ala. 84 ; *Leverett v. Carlisle*, 19 Ala. 80 ; *Apperson v. Cottrell*, 3 Porter, 51 ; *Shields v. Alston*, 4 Ala. 248. These cases recognize the principle as clearly as if they distinctly announced it, for, if the widow and next of kin, being cited, were parties defendant, no appeal could be taken by the contestants without joining them all, since an appeal must be taken by all the parties on the side appealing.

The act of 12th December, 1857, (Pamphlet Acts, 244,) authorizes an appeal from any final decree of the probate court within twenty days, whether there be a bill of exceptions or not. But, "when an appeal or writ of error is spoken of, the statute must be understood as using these terms in their known and received signification, and ought not to be extended to take in cases in which neither could be taken according to any course of practice known either to the civil or common law."—*Watson v. May*, *supra*. The statute can not be regarded as authorizing an appeal by persons who are not parties.

Cases might arise, in which the proponent of the will

would refuse to appeal from an erroneous decree rejecting it, while the parties prejudiced by his refusal would be left without any effective remedy against him by reason of his insolvency. The reply to the argument which this view suggests is, that those interested to establish a will may join in propounding it, or be made parties as proponents at any time before the decree; and may even be made parties plaintiffs, by application to the probate court, after the decree, for the purpose of appealing. With these rights secured to them, it is believed that no vigilant party can be materially injured by the operation of the principle which we adopt.

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1. *Of complaint.*—In a real action, the complaint may be amended, (Code, § 2254,) after the evidence is closed, by correcting a misdescription of the land sued for.—*Russell v. Erwin's Adm'r.*..... 45
2. *Same.*—If an action is brought by a sole plaintiff, and the names of others as co-plaintiffs with him are added by amendment, (Code, § 2403,) the name of the original plaintiff cannot be struck out by a subsequent amendment.—*Tarver v. Smith.*..... 135
3. *Same.*—Where the plaintiff sues as “trustee of L. H. and F. D.” two married women, the complaint may be amended, (Code, § 2403,) by adding the words “and for the remainder-men who are their children.”—*Humphries v. Dawson.*..... 199
4. *Same.*—Where the original summons and complaint are in the name of “C. L. F., guardian of R. H. F.,” the complaint cannot be so amended (Code, § 2403) as to make the plaintiff “R. H. F., by his next friend, C. L. F.”—*Fowlkes v. M. & C. Railroad Co.,*... 310
5. *Of execution.*—On motion to supersede and quash an execution, the court may allow the execution to be amended, by striking out the name of one of the defendants, so as to make it conform to the judgment on which it was issued.—*Goodman & Mitchell v. Walker.*..... 142
6. *Of bill in chancery.*—Where the equity of a bill rests on a statutory equitable attachment, the failure of the complainant to make the necessary affidavit, denying an intention to vex or harass the defendant, is a substantial defect, which cannot be remedied by an amendment.—*Saunders v. Carett.*..... 51
7. *Same.*—Under the act approved February 8, 1858, “amendatory of proceedings in chancery,” (Session Acts, 1857–8, p. 230,) the chancellor has a discretionary power to prescribe the terms on which an amendment of the bill shall be allowed.—*Rives, Battle & Co. v. Walthall's Executors.*..... 326

ASSIGNMENT.

1. *Of purchaser's note for price of land.*—An assignment of notes, given for the purchase-money of land, carries with it the vendor's lien on the land for their payment; and the assignee may enforce the lien in equity in his own name.—*Wells v. Morrow.*..... 125
2. *Of approved contract for purchase of Indian reservation.*—An assignment, not under seal, of an approved contract for the sale and purchase of an Indian reservation, although it does not convey to the assignee the title conferred by the approved contract, is nevertheless sufficient to authorize the issue of a patent to him; and the validity of a patent, subsequently issued to the assignee, is not affected by the fact that the assignment was not under seal. *Tarver v. Smith.*..... 135
Also, *Dillingham v. Brown.*..... 311
3. *Of mortgage.*—A creditor may buy in an outstanding mortgage on his debtor's property, take an assignment of it to himself, and

ASSIGNMENT—CONTINUED.

have it foreclosed for his benefit ; but, if he simply pays the mortgage debt, and takes from the debtor another mortgage on the property, the former mortgage is thereby extinguished; and a court of equity will not establish and enforce it for his benefit, as against purchasers at execution sale against the mortgagor, after the second mortgage has been declared fraudulent and void as to other creditors.—*Wiley, Banks & Co. v. Boyd*..... 625
See, also, DEEDS, 10, 11.

ATTACHMENT.

1. *Action on bond ; when attachment is wrongful.*—Where there is no debt owing from the defendant to the plaintiff in attachment, the condition of the bond is broken, and the obligee is entitled to recover, in an action on the bond, at least nominal damages, or such actual damages as he may have sustained ; and if there is no proof whatever of the existence of any debt, the court may instruct the jury, without hypothesis, to find for the plaintiff.—*Lockhart v. Woods*..... 631
2. *Same ; what is available as defense.*—In an action on an attachment bond, the defense is not limited to proof of the particular facts stated in the affidavit for the attachment, but may be rested on the existence of any one of the several grounds which authorize the issue of an attachment.—*S. C.*..... 631
3. *Same ; proof of debtor's pecuniary condition.*—Although neither indebtedness, nor pecuniary embarrassment, nor even insolvency, on the part of a debtor, can justify the wrongful, or mitigate the malicious suing out of an attachment against him; yet, in an action on the bond, it being shown in defense that, at the time the attachment was sued out against him, he was about to dispose of his slaves, and had already disposed of his other personal property at an inadequate price, evidence of his embarrassed pecuniary condition at the time is admissible, because pertinent to the question of the *bona fides* of the conveyances.—*S. C.*..... 631
4. *Same ; same.*—In such case, it is permissible for the plaintiff to rebut the evidence as to his pecuniary embarrassment, by proof of outstanding accounts due to him as a physician ; but, where such proof is made by his own books, it must be accompanied with evidence showing the correctness of the accounts as charged ; nor are the assessor's books, showing the amount of his taxable property as assessed that year, competent evidence for him.—*S. C.*..... 631
5. *Same ; proof of other attachments.*—The defendant may show, in defense of the action, as tending to rebut the presumption of malice, the issue of another attachment, and notice thereof to himself, the day before his own attachment was sued out ; *secus*, as to an attachment of which he had no notice.—*S. C.*..... 631
6. *Lien of attachment.*—Where an attachment is levied on mortgaged property before the mortgage is left with the proper officer for registration, its lien is superior to that of the mortgage.—*Hardaway v. Semmes*..... 657
See, also, CHANCERY, 1.

ATTORNEY-AT-LAW.

1. *Lien of*.—An attorney-at-law has a lien on a judgment or decree recovered for his client, to the extent of his fees for services rendered in the cause, which will prevail over an equitable set-off afterwards acquired by the defendant.—*Warfield v. Campbell*..... 527

AUCTIONS.

1. *Tax on auction sales*.—The tax imposed by law on the gross amount of auction sales, (Code, § 391, subd. 17,) is to be assessed against and paid by the auctioneer, and not by the owner of the property sold.—*The State v. Lee & Norton*..... 222

BAILMENT.

1. *Authority of consignee or warehouse-man to receive goods*.—A consignee of goods shipped by steamboat, is the agent of the owner to receive them at the port of delivery, and has authority to receive them at any particular point at that port; and where the bill of lading stipulates for a delivery "unto warehouse or assigns" at a river landing in the interior, the warehouse-man at that landing is the consignee.—*Winston v. Cox, Brainard & Co.*..... 222

BILL OF EXCEPTIONS.

1. *When necessary*.—The refusal of the primary court to dismiss, on motion, an action brought by a corporation, on account of the failure to give security for the costs at the commencement of the suit, is not revisable on error, unless an exception is reserved to it. *Tuskaloosa Wharf Co. v. Mayor &c.*..... 514
2. *Construction of*.—A recital in the bill of exceptions, that "the court decided" certain legal propositions, is not sufficient to show that such decisions were given as instructions to the jury.—*Cotten v. Bradley* 506

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Liability of irregular endorser*.—In an action by the payee of a note payable in bank, an averment that the defendant endorsed and delivered the note to the plaintiff, that it was protested for non-payment, and that notice thereof was given to the defendant, is sufficient to show a cause of action in favor of the plaintiff against the defendant.—*Price v. Lavender*..... 389
2. *Presumption as to endorsements*.—Endorsements in blank on a note are presumed, in the absence of evidence to the contrary, to have been made in the order in which they appear on the note; and where the plaintiff's name is thus endorsed on it, the legal presumption is, that the note has been regularly returned to him.—*S. C.* 389
3. *Proof of endorsement and plaintiff's ownership*.—In an action by the payee, against an irregular endorser of a note payable in bank, the plaintiff is not required to prove either the endorsement or his ownership of the note, unless they are denied by plea verified by affidavit.—*S. C.*..... 389
4. *Payment of bill by endorser*.—The payment of a bill of exchange by an endorser, or of a judgment which has been rendered there-

BILLS OF EXCHANGE, AND PROMISSORY NOTES—CONTINUED.

- on against a prior endorser, does not extinguish the bill as between him and such prior endorser, but gives him a right of action on it as fully as if he had never endorsed it.—*Cotten v. Bradley*... 506
5. *Proof of protest; charge invading province of jury.*—In an action on a foreign bill of exchange, by an endorsee against his endorser, the only evidence of protest being the deposition of the notary, and a copy of the protest; which copy, though appended to his deposition as an exhibit, does not appear to have been certified or authenticated otherwise than by the deposition,—the court is not authorized to instruct the jury, that the deposition and exhibit “are, of themselves, sufficient evidence of the protest of the bill.” *Stewart v. Russell*..... 619
6. *Assignment of purchaser's notes for price of land.*—An assignment of notes, given for the purchase-money of land, carries with it the vendor's lien on the land for their payment; and the assignee may enforce the lien in equity, in his own name.—*Wells v. Morrow*. 125
7. *Estoppel en pais against maker, from setting up defenses against assignee of note.*—Where the maker of a promissory note, in response to an inquiry by one who is about to purchase it, states that he has no defense against it, this does not preclude him from setting up against such purchaser a defense subsequently arising out of the original contract, *e. g.*, a total failure of consideration; but, when the note is purchased by the assignee on the faith of a promise by the maker to pay it, the latter is thereby estopped from asserting the invalidity of the note as between himself and the payee, either on the ground of fraud, or subsequent failure of consideration, and will be compelled to pay the assignee at all events.—*Cloud v. Whiting*..... 57
8. *Note not extinguishment of debt.*—The giving of a note, without more, is not a satisfaction of the pre-existing indebtedness.—*Fickling v. Brewer*..... 685

BONDS.

1. *County treasurer's bond.*—Where a county treasurer is re-elected several successive terms, the sureties on his official bond for any one term are responsible for money converted by him during that term, whether received during the term, or remaining in his hands at the expiration of the preceding term; but, where his receipt of money during the term is shown, and there is no evidence of any conversion of it during the term, he may discharge himself by proof of disbursements after the expiration of the term. *Moore v. Madison County*..... 670
2. *Forthcoming bond; death of slave discharges condition.*—The condition of a forthcoming bond is discharged by the death of the slave before forfeiture, and no liability results to the surety from the failure to deliver him according to the stipulations of the bond. *Phillipi v. Capell*..... 575
3. *Replevy bond; validity of.*—A replevy bond, taken by the sheriff from a stranger, conditioned for the payment of the attachment, or the delivery of the property at the termination of the attach-

BONDS—CONTINUED.

- ment suit, though defective as a statutory bond, (Code, § 2536,) is good as a common-law bond.—*Mitchell v. Ingram*..... 395
4. *Variance in description of bond; parol proof of identity*.—The omission of seventy-four cents, in describing the attachment in the replevy bond, is an immaterial variance, which is susceptible of explanation by parol evidence of identity.—*S. C.*..... 395
5. *Estoppel by bond*.—In an action on a forfeited forthcoming or replevy bond, the obligors are estopped from denying the defendant's title to the property, or showing that it was not subject to the attachment.—*S. C.*..... 395
6. *Injunction bond; statutory judgment on*.—On the dismissal of a bill in chancery, and the consequent dissolution of the injunction, under the law which was of force in 1845, a statutory judgment resulted against the obligors on the injunction bond, notwithstanding the failure of the register to certify the dissolution of the injunction to the clerk of the court in which the judgment at law was rendered.—*Dubberly v. Black's Adm'r.*..... 193
7. *Same; summary proceeding by surety against principal*.—A surety on an injunction bond, having paid the judgment against his principal and himself, which resulted by operation of law from the dissolution of the injunction, may maintain a summary proceeding against his principal, under section 2644 of the Code; and, under section 2650, the motion may be made in the county of the defendant's residence.—*S. C.*..... 193
8. *Same; averment and proof of issue of injunction*.—An averment, that the principal obligor in an injunction bond "obtained an injunction" from a circuit judge, involves the assertion that a writ of injunction was issued; but a recital in the bond, that he had "obtained an order for an injunction," does not show that the writ was issued.—*S. C.*..... 193

CHANCERY.

I. JURISDICTION.

1. *Attachment; affidavit that writ is not sued out to vex or harass*. When an equitable attachment is sued out by an accommodation endorser, on the ground that the principal debtor is fraudulently disposing of his property, (Code, §§ 2954 *et seq.*; Session Acts 1855-6, p. 54,) the complainant must make affidavit, as in analogous cases at law, that the writ is not sued out for the purpose of vexing or harassing the defendant; and where the equity of the bill rests on the attachment, the want of such affidavit cannot be supplied by amendment.—*Saunders v. Cavett* 51
2. *Charitable bequests*.—The doctrine is settled in this State, that the chancery court has jurisdiction, by virtue of its original, common-law powers, without claiming prerogative powers, and without the aid of the statute of 43d Elizabeth, to uphold bequests to charitable uses, where an ascertainable object, recognized as charity, is designated by the testator in general or collective terms, although no trustee is appointed by him, or the trustee appointed is incapable of taking the legal interest.—*Williams v. Pearson* 299

CHANCERY—CONTINUED.

3. *Estates of decedents; sale of lands for division.*—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among his heirs, after the death of one of the heirs, the sale bars the right of dower of the widow of such deceased heir, but does not extinguish her right as dowress; the proceeds of sale stand in lieu of the land itself, and the portion of the deceased heir must be paid to his administrator, for the purpose of administration; but so much thereof as corresponds with her dower interest in the land, must be paid over to the widow, on her executing a suitable bond for the protection of those entitled to the reversion; and on her failure to give such bond, the money must be loaned out, and the interest be paid to her annually during her life; but the probate court is not competent to make and execute the proper decree in such case, and resort must therefore be had to the chancery court.—*Chaney's Heirs v. Chaney's Adm'r.*..... 35
4. *Diversion of water; injunction of.*—A riparian proprietor cannot maintain a bill in equity, to restrain a diversion of water from the stream, when it appears that there was a natural outlet from the stream from time immemorial, and that the defendant's ditches only draw into a narrower channel, and give a directer course to the water flowing through this natural channel, without materially increasing the quantity which escapes from the main stream; nor on account of a past obstruction of the stream, which has been removed, and the continued repetition of which is not threatened.—*Potter's Executors v. Burden.*..... 651
5. *Same.*—Where plaintiff owns valuable and extensive machinery, which gives employment to a large number of hands, and which is worked by the water-power of a stream, a court of equity will restrain by injunction a repeated diversion of the water, and a threatened continuance of such diversion, by the upper proprietors, by means of a ditch on their own lands; and this, on the principle of preventing irreparable mischief and a multiplicity of suits.—*Wright & Rice v. Moore.*..... 593
6. *Injunction of judgment at law, on ground of fraud or surprise.*—In an action on an open account, due to the plaintiff from the defendant's intestate, a verdict and judgment having been rendered against the plaintiff, for the amount due on a promissory note, which was offered in evidence under the pleas of payment and set-off, he cannot enjoin the judgment in equity, by showing that the note was given for the price of property bought by him from the defendant as administrator; that the defendant objected to allowing the price of the property to be credited on the plaintiff's account against the intestate, because he insisted that the account was too large, and ought to be settled by a lawsuit, and said that, if plaintiff would give his note for the amount, he would use it as a set-off, *pro tanto*, against the account; that in a subsequent conversation, between the plaintiff's attorney and the defendant, pending the action, the defendant repeated this objection to the account, but urged no other objection to it; that on the trial his

CHANCERY—CONTINUED.

- counsel insisted before the court and jury, in his presence, that the note, being of later date, was *prima-facie* evidence that the account had been settled, and that the court so instructed the jury.—*Shannon v. Reese*. 586
7. *Same, on ground of accident or mistake*.—A defendant cannot obtain equitable relief against a judgment, (or a rehearing under section 2408 of the Code,) on the ground that he had forgotten, at the trial, that he had previously made a tender, which was refused, and which was less than the amount of the verdict in favor of the plaintiff; nor because an important witness, who was not subpoenaed, “moved and travelled about a great deal, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony.”—*Atlington v. Tucker*. 655
8. *Marshalling securities between grantee and execution creditors of grantor*.—The grantee in a deed of gift cannot maintain a bill in equity against subsequent execution creditors of the grantor, to compel a resort by them to lands conveyed by the grantor in trust for their benefit.—*Kirksey v. Stewart & Lucius*. 692
9. *Same, among legatees*.—Where the expenses of supporting and educating minor children are charged exclusively upon a specific fund, upon which certain pecuniary legacies are charged, but the latter are not limited to that specific fund, a court of equity will, if necessary, so marshal the securities as to give to the former charge a priority of payment out of the specific fund.—*Smith v. Kennard's Executor*. 695
10. *Abatement of specific and residuary legacies*.—An executor, who is also residuary legatee under the will, cannot maintain a bill in equity against the specific legatees, for an abatement of their legacies, on account of expenses incurred by him after paying their legacies in full, when it appears that he has received, as residuary legatee, more than the entire amount of the expenses so incurred, and that he voluntarily paid the specific legacies without requiring refunding bonds from the legatees.—*White v. Easters*. 154
11. *When wife may come into equity*.—A married woman cannot come into equity, to protect her interest in slaves, which she claims under a verbal gift, against subsequent execution creditors of the grantor; nor where she claims under a deed of gift, and shows by her bill that the trustee, to whom the legal title was conveyed for her use, has interposed a claim at law.—*Kirksey v. Stewart & Lucius*. 692
12. *When mortgagor may come into equity*.—The mortgagor of a slave, who is in possession, and who alleges that the debt has been paid, may nevertheless come into equity to enjoin an action at law for the slave, when it appears that there has been no acceptance of the payment as a satisfaction, and no release of the title by the mortgagee.—*Davis v. Hubbard*. 185
13. *When equity will hold absolute deed to be mortgage*.—A bill of sale for a slave, which is absolute on its face, and which recites the payment of a consideration much less than the real value of the slave; and a defeasance executed by the purchaser on the same

CHANCERY—CONTINUED.

- day, by which he agrees to reconvey the slave at the end of the year, provided she should then be alive, and provided the vendor should pay him the amount of a debt then existing, and any other debt which he might contract during the year,—construed together, constitute a mortgage.—*S. C.*..... 185
14. *Same*—A deed, absolute on its face, which is shown to have been intended to secure an antecedent debt, and to have been accompanied with a parol agreement that, on the payment of the debt within a reasonable time, the land should be reconveyed to the grantor, will be treated in equity as a mortgage.—*Wells v. Morrow*, 125
15. *Partnership; dissolution decreed as of what date*.—A court of equity, in decreeing the dissolution of a partnership, may declare at what date the contract shall be at an end; but it may be questioned, whether the mere violation of the articles of partnership by the defendant, not resulting in loss or injury, would make it proper for the court to fix the date of the dissolution at an earlier day than the abandonment of the partnership by the aggrieved party; and where the only effect of a modification of the chancellor's decree, so as to make the dissolution take effect as of an earlier day, would be to deprive the defendant of the right to the compensation stipulated in the articles, and that compensation is shown to be a reasonable allowance for the services actually rendered by him, the appellate court will not disturb the decree. *Dumont v. Ruepprecht* 175
16. *Equitable relief against usury*.—Where a debtor borrows money at usurious interest, gives a mortgage or deed of trust to secure its payment, and afterwards comes into equity for relief, he will be required to pay the principal sum due, with legal interest thereon; but rests will not be allowed at each renewal of the debt, so as convert the legal interest then due into principal. *McGehee's Adm'r v. George*..... 323
17. *Who is purchaser for valuable consideration without notice*.—A mortgage, taken to secure the payment of debt contemporaneously contracted, constitutes the mortgagee a purchaser for valuable consideration, who will be protected in equity against an outstanding vendor's lien of which he had no notice; *secus*, where the mortgage is taken to secure the payment of a pre-existing debt; and where a part of the secured debt is contemporaneously contracted, and the residue is pre-existing, he will be protected only to the extent of the new debt.—*Wells v. Morrow*.... 125
18. *Reformation of mortgage; notice of mistake*.—To authorize the reformation of a mortgage, as against a purchaser at execution sale against the mortgagor, so as to make it include a slave whose name was omitted by mistake, notice of the mistake before or at the sale is sufficient.—*Williams v. Hatch*..... 338

III. PLEADINGS, AND PRACTICE.

19. *Where bill may be filed*.—When a bill is filed in a chancery district in which no "material defendant resides," (Code, § 2875,) and the defect appears on the face of the bill, it is demurrable; a "material defendant," within the meaning of the statute, be-

CHANCERY—CONTINUED.

- ing one who is really interested in the suit, and against whom a decree is sought.—*Lewis v. Elrod*,..... 17
20. *Parties to bill to protect wife's separate estate*.—A bill to establish and protect a married woman's statutory separate estate in slaves, in which she claims a remainder, is properly filed in her name, by her next friend; and her husband is properly made a defendant, though he is a mere formal party, where the controversy is between the wife and one who claims the absolute property in hostility to her; but a vendor of the persons from whom the defendant purchased, who conveyed without warranty of title, is neither a necessary, nor a proper party to the bill.—*S. C.*, 17
21. *Offer to do equity*.—In a purchaser's bill for the specific performance of a contract of sale, the complainant must show that he has performed, or offered to perform, all the stipulations of the contract on his part; or he must show a sufficient excuse for his failure to do so, and aver his readiness and willingness to perform them.—*Cox v. Boyd*,..... 42
22. *Amendment of bill*.—Where the equity of a bill rests on a statutory equitable attachment, the failure of the complainant to make the necessary affidavit, denying an intention to vex or harass the defendant, is a substantial defect, which cannot be remedied by an amendment.—*Saunders v. Cavett*,..... 57
23. *Same*.—Under the act approved February 8, 1858, "amendatory of proceedings in chancery," (Session Acts, 1857-8, p. 230,) the chancellor has a discretionary power to prescribe the terms on which an amendment of the bill shall be allowed.—*Rives, Battle & Co. v. Walthall's Executors*,..... 329
24. *What relief may be had under alternate prayers*.—Whether a creditor may file his bill in a double aspect, asking to have a mortgage, executed by his debtor, declared fraudulent and void, or, if valid, foreclosed for his benefit, is a question which was not decided on the former appeal in this case, as erroneously stated in the second head-note of the former report of the case, (34 Ala. 91,) and which it is unnecessary now to decide, since the bill does not contain alternative allegations to support the alternative prayers.—*S. C.*,..... 329
25. *What relief may be had under creditor's bill*.—A creditor's bill, to obtain satisfaction of a judgment out of the debtor's assets, cannot be maintained, either under the act of 1844, (Session Acts 1843-4, p. 107,) or independently of that act, when it shows that all the assets are covered by valid mortgages, and does not make out a case for the foreclosure of the mortgages.—*S. C.*,..... 329
26. *Facts occurring after filing of bill, no ground for relief*.—The equity of a bill cannot be supported by facts occurring after the commencement of the suit, nor can such facts be made the basis of relief.—*S. C.*,..... 329
27. *Variance*.—Where the complainant files his bill in the character of mortgagee, asking the correction of a mistake in the mortgage; while the proof shows that the mortgage has been foreclosed under a power of sale, and that the complainant has since

CHANCERY—CONTINUED.

- acquired the interest of the purchaser at the sale,—the variance between the allegations and proof is fatal.—*Williams v. Hatch*... 338
28. *Plea of purchase for value without notice*.—A plea of a purchase for valuable consideration without notice, must aver the actual payment of the money, and must negative notice at the time of the payment.—*Wells v. Morrow*..... 125
29. *Responsiveness of answer*.—Where the bill alleges, that one of the defendants had sold a portion of the property sought to be condemned to the payment of the complainants' debts, under a pretended mortgage or lien, given by the debtor to secure a fictitious debt; and that the secured debt, if any part of it was just, was fully discharged by the proceeds of sale, leaving a balance in the defendant's hands subject to the complainants' claims,—an answer, asserting the *bona fides* of the secured debt, the validity of the mortgage, (which is made an exhibit, and which contains a power of sale,) and that the entire proceeds of the sale were not sufficient to satisfy the secured debt, is responsive.—*England & Lee v. Reynolds, Devoe & Co.*..... 370
30. *Weight of answer as evidence*.—Where a creditors' bill seeks to have a deed of trust, executed by a debtor for the security of a portion of his creditors, declared a general assignment; an answer by the preferred creditors, which denies that the deed is a general assignment, or that it conveys all the grantor's property, but which is silent as to any other property then owned by him, is entitled to but little weight as evidence.—*Longmire v. Goode & Ulrich*..... 577
31. *Dissolution of injunction on answer*.—Where the answers deny all the charges and allegations of fraud, on which the prayer for an injunction is founded, the injunction is properly dissolved.—*Saunders v. Cavett*..... 51
32. *Same*.—Where irreparable mischief might result from the dissolution of a special injunction, restraining the erection of a dam, which would create a malarious pond injurious to the health of the surrounding community, the chancellor may, in his discretion, retain the injunction until the hearing, notwithstanding the denials of the answer; but, if the chancellor, in the exercise of his discretion, dissolves the injunction on the answer, the appellate court will not reverse his decree, unless fully and satisfactorily convinced that he erred.—*Bibb v. Shackelford*..... 611
33. *Extension of time for payment of mortgage debt; dismissal generally, and without prejudice*.—Where a mortgager files a bill to redeem, and is allowed a day for the payment of the money into court, but fails to make the payment within the time prescribed by the decree, without any fraud, accident, or mistake, the chancellor is not bound to extend the day of payment, but may dismiss the bill; nor is there any rule which requires, in such case, that the dismissal shall be without prejudice.—*Segrest v. Segrest*, 674

CHARITABLE BEQUESTS.

See CHANCERY, 2.

LEGACY AND DEVISE, 1, 2.

CHARGE OF COURT.

1. *Abstract charge*.—An abstract charge, which asserts a correct legal proposition, is not a reversible error, unless the appellate court is reasonably convinced that it must have misled the jury.—*Russell v. Erwin's Adm'r*..... 44
2. *Same*.—An abstract charge may be refused.—*Knox v. Easton*.... 345
3. *Error without injury in charge asserting incorrect legal proposition*.
A charge to the jury, which, though incorrect as a general legal proposition, is correct in the particular case when construed in connection with the evidence, is no ground of reversal.—*S. C.*... 345
4. *General charge on evidence*.—Where the bill of exceptions purports to set out all the evidence, and does not show that any proof was made of the defendant's possession of the premises sued for, a general charge to the jury, instructing them to find for the plaintiff if they believed the evidence, is erroneous.—*Costly v. Tarver*... 107
5. *Same*.—In an action on an attachment bond, if there is no proof whatever of the existence of any debt from the defendant to the plaintiff in attachment, the court may instruct the jury, without hypothesis, to find for the plaintiff.—*Lockhart v. Woods*..... 631
6. *Same*.—When there is an entire failure on the part of the plaintiff to prove a fact necessary to his recovery, the court may instruct the jury, without hypothesis, to find a verdict for the defendant; but, if the court, having instructed them hypothetically—"if they believe the evidence"—to find for the defendant, afterwards repeats this charge to them, "accompanying it with the intimation, that their further deliberations must result in a verdict for the defendant, else they would subject themselves to the consequences of a contempt of court,"—this is an error, from which injury will be presumed, and which will work a reversal, unless the bill of exceptions affirmatively shows that the court might properly have directed the jury, in the first instance, to find a verdict for the defendant, without referring to them the credibility of the testimony.—*Crutcher v. M. & C. Railroad Co.*..... 579
7. *Charge invading province of jury*.—In an action on a foreign bill of exchange, by an endorsee against his endorser, the only evidence of protest being the deposition of the notary, and a copy of the protest; which copy, though appended to his deposition as an exhibit, does not appear to have been certified or authenticated otherwise than by the deposition,—the court is not authorized to instruct the jury, that the deposition and exhibit "are, of themselves, sufficient evidence of the protest of the bill."—*Stewart v. Russell*..... 619
8. *Same*.—What is ordinary care, on the part of a vessel entering a harbor, is a question of fact, to be determined by the jury from the character of the harbor, the number of vessels accustomed to frequent it, the time of day or night when the vessel enters, and the other circumstances of the particular case; and a charge to the jury, instructing them that such vessel "is bound to keep the most vigilant watch," is an invasion of their province.—*Foster v. Holly*..... 76

CLERK.

1. *Authority to receive payment.*—A clerk has no authority, before judgment, to receive payment of the plaintiff's debt; yet, if he receives the money from defendant before judgment, retains it in his hands until after judgment, and then manifests, by some plain and unequivocal act, his intention to hold it in his official capacity as clerk, the payment is good, and the judgment thereby discharged.—*Governor v. Read* 252

CODE OF ALABAMA.

1. § 391, subdivision 17. Tax on auction sales.—*The State v. Lee & Norton*..... 222
2. § 539. Sale of sixteenth section lands.—*Miller v. The State*..... 600
3. § 560. Incompetency of presiding judge from interest.—*Hooks v. Barnett's Executor*..... 607
4. § 573. Special supreme court.—*Goodman & Mitchell v. Walker*... 142
5. §§ 896-7. Liability of steamboat for landing goods at improper place.—*Winston v. Cox, Brainard & Co.*..... 268
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COMMON LAW.

1. <i>Presumed to exist elsewhere</i> .—In the absence of proof to the contrary, the courts of this State will presume that the common law prevails in other States.— <i>McDougald's Adm'r v. Carey</i>	320
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CONFLICT OF LAWS.

See CONSTITUTIONAL LAW, 2, 3, 4.

CONSCRIPT LAWS.

See CONSTITUTIONAL LAW, 1-6.

CONSTITUTIONAL LAW.

1. *Conscript laws*.—The several acts of congress, commonly called the "conscript laws," (C. S. Statutes at Large of 1st Congress, 1st session, p. 29; *ib.* 2d session, p. 61,) are constitutional.—(Per STONE J.)—*Ex parte Hill*, in re *Willis*. 429
2. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer*.—The courts and judicial officers of the State have no jurisdiction, on *habeas corpus*, to discharge from the custody of an enrolling officer of the Confederate States, on the ground of physical incapacity for military service, persons who have been enrolled as conscripts under the several acts of congress.—*S. C.* 429
3. *Same*.—On petition for *habeas corpus*, by a person who, being liable to military service under the act of congress approved April 16th, 1862, commonly called the "first conscript law," procured and placed in his stead a substitute, and was thereupon discharged; but, after the passage of the "second conscript law," approved September 27th, 1862, was again arrested by the enrolling officer, on the ground that his discharge had become inoperative, because his substitute was personally liable to service under the latter law,—the State court or judge to whom the application for the writ is made, has jurisdiction to determine the question of fact, whether the petitioner placed in his stead a substitute, and was thereupon discharged; and also the question of law, whether such discharge exempted the petitioner from liability to service under the latter law, his substitute being within the conscript age as therein specified. (A. J. WALKER, C. J., *dissenting*.) *Ex parte Hill*, in re *Armistead*. 458
4. *Same*.—The commandant of conscripts, at one of the camps of instruction, having vacated, on the ground of fraud, a discharge procured by a person who, being liable to military service under the "conscript laws" of congress, had furnished a substitute in his stead; and the decision of the commandant having been approved by the secretary of war,—a State court or judge has no jurisdiction, on *habeas corpus* or otherwise, to revise or control the action and decision of the commandant, at the instance of the person whose discharge is thus vacated, on the ground that *ex-parte* affidavits were received against him on the trial, or that he was not notified of the time and place of taking testimony, or that he was not allowed an opportunity to cross-examine witnesses. (R. W. WALKER, J., *dissenting*.)—*S. C.* 458
5. *Liability of principal to military service under "second conscript law," having furnished substitute under first*.—The 9th section of the "first conscript law" of congress declaring, that persons not liable to military service "may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war;" and the general orders (No. 37) published by the secretary of war on the 19th of May, 1862, providing, in reference to exemptions procured by furnishing substitutes, that "such exemption is valid only so long as the said substitute is legally exempt,"—a person who was liable to conscription under said law,

CONSTITUTIONAL LAW—CONTINUED.

- and who, after publication of said general orders, placed in his stead a substitute, who was between the ages of thirty-five and forty years, and thereupon obtained his discharge, became again liable to conscription, on the passage of the "second conscript law," and the president's call for men between the ages of thirty-five and forty years; and the same principle applies to persons who furnished substitutes after the publication of the general order (No. 64) dated September 8, 1862, which declares, that "a substitute becoming liable to conscription renders his principal also liable." (*Per tot. cur.*)—*S. C.*..... 458
6. *Conscientious scruples against bearing arms, as ground of exemption from military service.*—A person who "conscientiously scruples to bear arms," may claim exemption from military duty, under the provisions of the State constitution, (art. iv. *militia*, § 2,) upon payment of an equivalent for personal service; yet he is not entitled, on that account, to exemption from military service in the armies of the Confederate States, unless he belongs to one of the religious denominations specially exempted by the acts of congress.—*Ex parte Stringer*..... 457
7. *Act of 1858, relative to defective acknowledgments of deeds.*—The first section of the act of February 8, 1858, "to fix the mode of conveying the estates of husband and wife and for other purposes," (Session Acts 1857–8, p. 36,) which provides, that conveyances by husband and wife, theretofore made, shall not be held insufficient in law on account of defects in the certificates of acknowledgment, is unconstitutional.—*Ala. Life Insurance and Trust Co. v. Boykin*..... 510
8. *Provisions of Code as to conveyances of wife's separate estate.*—Section 1997 of the Code, so far as it requires conveyances of property held by the wife under the acts of 1848 and 1850, to conform to the provisions of the Code, is not violative of any constitutional provision.—*Warfield v. Ravesies and Wife*..... 518
9. *Vagrant law.*—Sections 3795–98 of the Code, in reference to the proceedings against vagrants, are unconstitutional, because no appeal from the judgment of the justice is provided.—*Ex parte Haughton*..... 570

CONTINUANCE.

1. *Conditional continuance.*—Where a continuance is granted to the defendant, on the condition that, if the costs are not paid within ninety days after the adjournment of the court, his plea shall be stricken from the file, and the plaintiff have judgment by *nil dicit*; if the costs are not paid within the specified time, the court may, at the next term, strike the plea from the file, and render judgment by *nil dicit* for the plaintiff.—*Waller v. Sultzbacher & Paige*..... 318

CONTRACT.

1. *Sufficiency of consideration.*—Where a third person joins with a debtor in the execution of a promissory note, payable to the creditor, and to be delivered as collateral security for the original

CONTRACT—CONTINUED.

- indebtedness, the note is without consideration as to him; but a valid promise by the debtor, contemporaneously made, to indemnify him against liability on the note, forms a sufficient consideration to support the note as to the surety.—*Rutledge's Adm'r v. Townsend, Crane & Co.*..... 706
2. *Certainty.*—A promise by the principal to his surety, made to induce the latter to join with him in the execution of a promissory note, to be delivered to the creditor as collateral security for the original debt, on which the surety was not bound, to the effect that he should be “*amply secured*” against liability on the note, is sufficiently definite and certain to support an action at law, if not performed within a reasonable time before the maturity of the note.—*S. C.*..... 706
3. *Contract between physician and patient.*—There is nothing in the ordinary relation between a physician and his patient, which prevents him from discounting his services at the instance of the patient, and entering into a contract with another person for the payment of the charges for his future services; nor is the assent of the patient to such new contract necessary.—*White v. Mastin.*..... 147
4. *Proof of special contract with physician.*—In an action to recover for the value of medical services rendered by plaintiff to a third person, it is permissible for him to prove that, although he did not begin, he continued his services at the instance and request of the defendant; and, for this purpose, he may show that, when he spoke of discontinuing his visits, a telegraphic dispatch and a letter from defendant, requesting that all necessary attention be bestowed on the patient at his expense, were shown to him by the person who had received them, and who then requested him to continue his attendance.—*S. C.*..... 147
5. *Same.*—In such case, defendant's dispatch being addressed to the infirmary at which the patient was confined, but authorizing the employment of persons not connected with the infirmary to perform necessary services for the patient, the fact that the defendant has paid the account contracted with the infirmary, which did not embrace the plaintiff's account, is irrelevant and inadmissible. *S. C.*..... 147
6. *Construction of special contract, evidenced by telegraphic dispatch.* A telegraphic dispatch, sent by the defendant to an infirmary at which a patient is confined, in these words: “I have just learned of D.'s accident; show him every attention, and I will pay expenses,”—authorizes the infirmary to procure for the patient any medical services which may be necessary, and obliges the defendant to pay the person by whom such services are rendered, although he may not be connected with the infirmary.—*S. C.*..... 147
7. *Letter construed as authorizing employment of physician, and making writer liable as original promisor.*—Defendant having sent a telegraphic dispatch to an infirmary, requesting that all necessary attention might be bestowed, at his expense, on a patient therein confined by an accident; a letter written by him two days afterwards, addressed to the person by whom his dispatch was answered, and containing these words, “may I not rely on your

CONTRACT—CONTINUED.

providing for D. as you or his attending physician may think best",—confers on the person to whom it is addressed authority to employ, at the expense of the defendant, such physician as he might think best, and renders the defendant liable, as on an original promise, for the services rendered by such physician.

S. C...... 147

8. *Proof of contract of hiring.*—The question being, whether defendants employed plaintiff's slave on their boat without authority, or hired him from plaintiff's authorized agent; and there being some evidence tending to show the agency,—the fact that the agent "came down to the boat, and inquired about the slave," is relevant evidence, as tending to show knowledge and assent on the part of the agent to the employment of the slave by the defendants, and thus tending to show a contract of hiring.—*Gimon v. Terrell*..... 208
9. *Contract of sale; to whom title passes.*—Where a mother purchases a slave for her infant daughter, with money furnished for that purpose by the child's grandfather, but accepts a bill of sale to herself, the legal title vests in her, and not in her daughter; and the fact that she objected to the bill of sale at the time, because it did not convey the title to her daughter instead of herself, and that the vendor then promised to execute another bill of sale at some future time, does not vary the case.—*Haden and Wife v. Tucker* 399
- 10 *Same.*—Where the future earnings of a married woman are settled on a trustee for her separate use, by a decree in chancery rendered under the 4th section of the act of January 31, 1846, and she afterwards purchases a slave with her separate earnings, the legal title vests in the trustee to whom the vendor's bill of sale purports to convey it for her separate use, and not in the trustee named in the decree.—*Nuckolls v. Pinkston*..... 615

CORPORATIONS.

1. *Statutory power of corporation to levy special tax.*—A grant of power to a corporation to levy a special tax must be strictly construed, and any doubtful question as to the extent of the power must be decided against the corporation.—*Lott v. Ross & Co.*..... 156
2. *Construction of statute authorizing special tax for improvement of bay and harbor of Mobile.*—The 5th section of the act approved February 21, 1860, entitled "An act for the improvement of the bay and harbor of Mobile," (Session Acts 1859, p. 538,) which authorizes the assessment and collection of a special tax, "not exceeding twenty cents upon each hundred dollars of taxable property within said county," does not authorize the imposition of a tax on the gross amount of sales of merchandize.—*S. C.*..... 156
3. *Construction of act of February 24, 1860, authorizing city of Montgomery to aid South and North Alabama railroad.*—The act "to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad," approved February 24, 1860, which authorizes the corporate authorities of said city, "in such manner as they may deem expedient, to take the sense of the holders of real estate in said city, upon the proposition to raise by tax upon

CORPORATIONS—CONTINUED.

real estate" a specified sum, to be invested in stock of said railroad company, requires that the sense of all the holders of real estate in the city shall be ascertained, by an expression of their wishes *per capita*, before the proposed tax can be levied: an election, held under an ordinance of the corporate authorities, by which it is provided that the vote shall be taken *pro rata* according to the value of the real estate owned by the respective voters, "each voter being allowed one vote for every hundred dollars of assessed real estate owned by him," is not a compliance with the terms of the act; and although it appears, from the register kept by the managers of the election, that, of all the persons who voted at such election, a majority in number voted for the tax, this does not cure the defect in holding the election on illegal principles, which may have prevented persons from voting.—*City Council of Montgomery v. The State, ex rel. &c.* 162

COSTS.

See BILL OF EXCEPTIONS, 1.

CONTINUANCE, 1.

EXECUTORS AND ADMINISTRATORS.

COUNTY TREASURER.

1. *Liability on official bond.*—Where a county treasurer is re-elected several successive terms; the sureties on his official bond for any one term are responsible for money converted by him during that term, whether received during the term, or remaining in his hands at the expiration of the preceding term; but, where his receipt of money during the term is shown, and there is no evidence of any conversion of it during the term, he may discharge himself by proof of disbursements after the expiration of the term. *Moore v. Madison County*..... 670
2. *Conclusiveness of report of examining committee.*—The report of an examining committee, appointed under the act of 1822, (Clay's Digest, 580, § 28,) which shows a balance in favor of the county treasurer, and which is approved by the commissioners' court, is no bar to a subsequent action on the official bond of the county treasurer.—*S. C.*..... 670

CRIMINAL LAW.

1. *Homicide of slave by slave; sufficiency of verdict.*—The murder of a slave by another slave is an offense within the provisions of section 3312 of the Code; and, since the statute does not create different degrees of the offense, it is not necessary that the verdict should specify any degree.—*Crockett v. The State*..... 387
2. *Homicide of white person by slave.*—If a slave kills a white person, believing him at the time to be a runaway negro, and being justified by the attendant circumstances in the belief, the degree of the homicide—whether murder, voluntary manslaughter, or involuntary manslaughter—is the same that it would have been if the person slain had been a runaway negro; but the punishment of

CRIMINAL LAW—CONTINUED.

- the offense is that prescribed for such degree of homicide when perpetrated by a slave on a white person.—*Isham v. The State*. 213
3. *Same; conviction of less offense than charged in indictment.*—Under an indictment charging a slave with the voluntary manslaughter of a white person, a conviction may be had for involuntary manslaughter in the commission of an unlawful act.—*S. C.*..... 213
4. *Disturbing religious worship.*—To constitute an interruption or disturbance of “an assemblage of people met for religious worship,” (Code, § 3257,) it is not necessary that the interruption or disturbance should be made during the progress of the religious services; if made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain in the house, and before a reasonable time has elapsed for their dispersion, the offense is complete.—*Kinney v. The State*..... 224
5. *Embezzlement.*—A person who is employed by a post-commissary to superintend a bakery, and whose duty it is to receive all the flour sent to the bakery by the commissary, to have the same made into bread at the bakery, and to deliver the bread on the order of the commissary, may be indicted for embezzlement (Code, § 3143) as the agent of the commissary.—*Hinderer v. The State*..... 415
6. *Persuading slave to leave master's service.*—To authorize a conviction under section 3128 of the Code, it is not sufficient to show that the defendant advised the slave to leave the master's service: he must have produced in the slave's mind an intention to leave the master's service; but it is not necessary that he should have a specific intention to induce the slave to leave, nor that the slave should actually leave the master's service.—*Wilson v. The State*..... 411
7. *Negligent treatment of slave; joinder of offenses in indictment.*—An indictment which charges that the prisoner, being the owner of certain slaves, “did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age,” (Code, §§ 3297–98,) is not objectionable for duplicity, although a conviction might be had on proof of negligent treatment in any one of the specified particulars; nor does the joinder of the names of several slaves, in the same count, render it obnoxious to that objection, although a conviction might be had on proof of the negligent treatment of any one of them. *Cheek v. The State*..... 227
8. *Same; description of slaves in indictment.*—In such an indictment, slaves whose names are to the grand jurors unknown, may be thus described, if by the use of due diligence their names cannot be ascertained; but, if it is shown on the trial that, at the time the indictment was found, their names were in fact known, or could have been ascertained by due diligence, the defendant will be entitled to an acquittal as to them; yet proof of the single fact that their names were known at the time of the trial, without more, would not entitle him to an acquittal.—*S. C.*..... 227
9. *Same; election by prosecution.*—Under such an indictment, charging the negligent treatment of several slaves, if it should appear on the trial that the offenses as to the several slaves were distinct, it would be the duty of the court to compel an election by the

CRIMINAL LAW—CONTINUED.

- prosecution; yet, if all the slaves are on the same plantation, and the defendant's conduct towards all of them in the aggregate is relied on for a conviction, there is no ground for such compulsory election.—*S. C.*..... 227
10. *Same; relevancy of evidence, as showing quantity of meat furnished defendant's slaves.*—The indictment having been found in May, 1860, and the prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that afterwards meat was supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves.—*S. C.*.... 227
11. *Same; opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.—*S. C.*... 227
12. *Admissibility of confessions.*—Where the prisoner, a slave, being tied, and about to be whipped, in the presence of his master and other white men, was asked why he committed the offense with which he was charged, and was told that his punishment would be lighter if he confessed the truth; a repetition of the confession thus obtained is not competent evidence against him, when it is shown to have been made on the next day, in the presence of his master, in reply to a similar question by the officer who had arrested him, and who was conveying him to jail.—*Joe v. The State*, 422
13. *Charge on sufficiency of evidence.*—A charge, instructing the jury "that they must find the prisoner not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt," asserts a correct legal proposition, and should be given at the request of the prisoner. *S. C.*..... 422
14. *Sufficiency of recognizance; limitation of prosecution.*—An indictment for selling liquor to a slave, "whose name and whose owner is unknown to the jurors," although fatally defective on demurrer, contains a sufficient description of the offense charged to uphold a recognizance, based thereon, for the appearance of the defendant at the next term to answer a new indictment; and if a new indictment is found at the next term, although after the lapse of twelve months from the commission of the offense, (Code, §§ 3374, 3376,) the statute of limitations is no bar to the prosecution.—*Foster v. The State*..... 425
15. *Competency of juror.*—An assault with intent to commit murder is "an offense of the same character" as murder, within the meaning of the statute (Code, § 3583) defining the grounds of challenge to jurors in criminal cases.—*Crockett v. The State*..... 387
16. *Criminal jurisdiction of justice limited to county.*—A justice of the peace has no authority, under our statutes, to issue a warrant for the arrest of a person in his county, on an affidavit charging him with the commission of a criminal offense in another county;

CRIMINAL LAW—CONTINUED.

- such warrant, therefore, and all proceedings had under it, are absolutely void.—*Woodall v. McMillan*..... 622
17. *Jurisdiction of probate judge to revise proceedings of magistrate under peace-warrant*.—A probate judge has no jurisdiction, on *habeas corpus* or otherwise, to revise an order made by a justice of the peace, requiring a party to give security to keep the peace, and directing his imprisonment until such security is given: the only mode of revising the action of the justice, is by an appeal to the circuit court under section 3351 of the Code.—*Coburn, Ex parte*..... 237

DAMAGES.

1. *Action on attachment bond*.—Where there is no debt owing from the defendant to the plaintiff in attachment, the condition of the bond is broken, and the obligee is entitled to recover, in an action on the bond, at least nominal damages, or such actual damages as he may have sustained; and if there is no proof whatever of the existence of any debt, the court may instruct the jury, without hypothesis, to find for the plaintiff.—*Lockhart v. Woods*..... 631
2. *Same; proof of other attachments*.—The defendant may show, in defense of the action, as tending to rebut the presumption of malice, the issue of another attachment, and notice thereof to himself, the day before his own attachment was sued out; *secus*, as to an attachment of which he had no notice.—*S. C.*..... 631
3. *Same; proof of debtor's pecuniary condition*.—Although neither indebtedness, nor pecuniary embarrassment, nor even insolvency, on the part of a debtor, can justify the wrongful, or mitigate the malicious suing out of an attachment against him; yet, in an action on the bond, it being shown in defense that, at the time the attachment was sued out against him, he was about to dispose of his slaves, and had already disposed of his other personal property at an inadequate price, evidence of his embarrassed pecuniary condition at the time is admissible, because pertinent to the question of the *bona fides* of the conveyances. *S. C.*..... 631
4. *Same; same*.—In such case, it is permissible for the plaintiff to rebut the evidence as to his pecuniary embarrassment, by proof of outstanding accounts due to him as a physician; but, where such proof is made by his own books, it must be accompanied with evidence showing the correctness of the accounts as charged; nor are the assessor's books, showing the amount of his taxable property as assessed that year, competent evidence for him.—*S. C.*..... 631
5. *Collision between vessels*.—To preclude a recovery of damages for injuries caused by a collision between two vessels, on the common-law doctrine which denies a recovery to either party where both are at fault, the plaintiff's fault must have occurred at the time of the accident, and contributed proximately to it; but, if the consequences of the defendant's negligence, which caused the injury, might have been avoided by the exercise of ordinary

DAMAGES—CONTINUED.

- care on the part of the plaintiff, his failure to exercise that degree of care precludes him from any redress.—*Foster v. Holly*.... 76
6. *Same*.—Although the act of fastening a skiff in the channel of a navigable river, along which vessels are frequently passing, in such a manner that it cannot be conveniently and expeditiously removed, is an act of negligence on the part of the owner, or person having charge of the skiff; yet it cannot be said to contribute proximately to a collision with a passing vessel, caused by the negligence of the persons in charge of the vessel, and, consequently, does not preclude a recovery against the owners of the vessel for damages resulting from the collision.—*S. C.*..... 76
7. *What is care or negligence on part of stationary vessel*.—Although it might be affirmed, as a legal proposition, 'that if a skiff was fastened in a safe and secure place unless rendered insecure and unsafe by the negligence of a passing vessel, she was not in an improper place, and was guilty of no neglect by being at such place'; yet it certainly would be in an improper place, if fastened in a manner which rendered it difficult to be removed, in the channel of a river along which vessels are frequently passing. *S. C.*..... 76
8. *Same by vessel entering harbor*.—A vessel entering a harbor, is bound to exercise ordinary care to prevent accidents; which is a question of fact, to be determined by the jury from the character of the harbor, the number of vessels accustomed to frequent it, the time of day or night when the vessel enters, and the other circumstances of the particular case; and a charge to the jury, instructing them that such vessel "is bound to keep the most vigilant watch," is an invasion of their province.—*S. C.*..... 76
9. *Action against owners of steamboat, for loss of slave transported without master's authority; counsel fees*.—In a statutory action against the owners of a steamboat, for the loss of a slave who was transported on their boat without the written authority of the master (Code, § 1010,) the plaintiff's counsel fees are recoverable as a part of the reasonable expenses attending the prosecution of the suit.—*Bell v. Chambers*..... 660
10. *Fraud or misrepresentation by vendor*.—In an action by the purchaser, to recover damages for a misrepresentation of the boundary lines by the vendor, in falsely stating that a mill and mill-pond were included in the tract, the measure of damages which the plaintiff is entitled to recover, is the difference between the actual value of the land and its value on the supposition that the representation was true; but he cannot be allowed to prove what would have been the value of the land if the pond had been on a part of the tract different from that on which, according to the averments of the complaint, it was represented to be.—*Foster v. Kennedy's Adm'r*..... 350
11. *Same, available as set-off*.—Under section 2240 of the Code, damages on account of the lessor's misrepresentations as to the capacity and condition of a mill on the leased premises, are available as a set-off in an action of covenant to recover the rent reserved.—*Cage & Salter v. Phillips*..... 382

DAMAGES—CONTINUED.

12. *Same*.—Under section 2240 of the Code, a cross demand, growing out of a defect in the vendor's title, is available as a set-off in an action on the notes for the purchase-money, although the purchaser is in possession of the lands; but, before the Code was adopted, the law was otherwise.—*Martin v. Wharton*..... 637
13. *Same; inchoate right of dower not good set-off*.—An inchoate right of dower cannot be measured accurately by any pecuniary standard; consequently, damages for the breach of a promise to procure a relinquishment of such right, or to indemnify against it by bond with surety, is not available as a set-off to the purchaser, (Code, § 2240,) in an action on the notes given for the purchase-money of the lands.—*S. C.*..... 637
14. *Trespass for false imprisonment*.—In trespass for false imprisonment, the void warrant of arrest, and proceedings had under it, are admissible evidence in mitigation of vindictive damages.—*Woodall v. McMillan*..... 623
15. *Trespass against the principal, for unlawful act of the agent*. A person who employs an agent to seize the personal property of another without authority, is responsible to the injured party equally with the agent, although not actually present when the trespass was committed; and the acts and declarations of the agent, in the performance of the unlawful service, are competent evidence against his principal.—*Raisler v. Springer*, 703
16. *Note given as collateral security*.—In an action against the maker of a promissory note, which was made and delivered to the plaintiff as collateral security for the debt of another, on which the defendant was not bound, if the plaintiff has received partial satisfaction of the original debt, he is only entitled to recover the balance unpaid.—*Rutledge's Adm'r v. Townsend, Crane & Co.*..... 706

DEEDS.

1. *Proof of execution*.—Where there are no attesting witnesses to a deed, executed by the grantor in an official character, proof of his handwriting, and of his official character at the date of the deed, is sufficient proof of its execution.—*Dillingham v. Brown*..... 311
2. *Secondary evidence*.—The existence and loss of a deed, executed in another State, having been proved by the admissions of the defendant's vendor; and also her declarations, to the effect that, after the loss of the original, she had procured a copy of the deed, and had it recorded here,—a transcript from the record, properly certified, is admissible evidence.—*Arthur v. Gayle*..... 259
3. *Proof of delivery*.—The testimony of the subscribing witness to a deed, to the effect that, immediately after its execution, the grantor handed it to the mother of the grantees, who were infants living with their mother, "and told her to keep it," is, at least, sufficient to let the deed go to the jury; the intention of the grantor, that it should or should not be considered as delivered, being a question for the determination of the jury, under proper instructions from the court.—*Gregory v. Walker*..... 26
4. *Whether instrument is deed or will*.—An instrument of writing, in form a deed, which purports to be made in consideration of the

DEEDS—CONTINUED.

- 'regard' entertained by the grantor for the grantees, and for the further consideration of one dollar in hand paid, and which conveys to the grantees, by the words of conveyance usually employed in deeds, certain real and personal property, 'together with the right to control the same at the death' of the grantor,—is a deed, and not a will.—*S. C.*..... 26
5. *Evidence of fraud in execution, or illegality of consideration.*—Plaintiffs claiming title to the land in controversy under a deed of gift from defendant's deceased father, which defendant sought to impeach on the grounds of non-delivery, fraud in the execution, and illegality of consideration; a written agreement between said grantor and plaintiffs' mother, an unmarried woman, which was executed several months before the deed, did not refer to the property conveyed by the deed, was not referred to in the deed, and simply stipulated for the performance by plaintiffs' mother of domestic services for said grantor during his life, in consideration of which he promised to give her certain personal property at his death, and to provide board until that time for her and her said children,—is, *prima facie*, irrelevant; nor is it admissible in connection with parol evidence, which is offered "for the purpose of showing that said deed was fraudulently obtained," but which does not tend to show fraud in its execution.—*S. C.*..... 26
6. *Parol evidence inadmissible to change.*—Parol evidence is not admissible at law, to show that a deed, absolute on its face, was intended to operate only as a mortgage.—*Bragg v. Massie's Adm'r.*..... 89
7. *Acknowledgment of deed by married woman.*—The case of *Boykin v. Rain*, (28 Ala. 432,) as to the sufficiency of the acknowledgment of a deed by a married woman under the act of 1803, (Clay's Digest, 155, § 27,) re-affirmed.—*Ala. Life Insurance & Trust Co. v. Boykin.*..... 510
8. *Constitutionality of act of 1858, relative to defective acknowledgments.* The first section of the act of February 8, 1858, "to fix the mode of conveying the estates of husband and wife and for other purposes," (Session Acts 1857-8, p. 36,) which provides, that conveyances by husband and wife, theretofore made, shall not be held insufficient in law on account of defects in the certificates of acknowledgment, is unconstitutional.—*S. C.*..... 510
9. *Constitutionality of law regulating conveyances.*—Section 1997 of the Code, so far as it requires conveyances of property held by the wife under the acts of 1848 and 1850 to conform to the provisions of the Code, is not violative of any constitutional provision.—*Warfield v. Ravesies and Wife.*..... 518
10. *What is general assignment.*—A deed, by which a debtor conveys to a trustee, for the benefit of certain specified creditors, substantially all the property which he holds subject to legal process in this State, is a general assignment, (Code, § 1556,) and enures to the benefit of all his creditors equally.—*Longmire v. Goode & Ulrick* 577
11. *Validity of assignment for benefit of creditors; assent of beneficiaries.*—An assignment, by which a debtor conveys to a trustee, for the benefit of all his creditors equally, all his property, real and personal; and which authorizes the trustee "to sell and dispose

DEEDS—CONTINUED.

of the said real and personal estate, and to collect the said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or private contract, and with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient so to do,"—is not vitiated by the general description of the property conveyed, nor by the failure to specify the names of the creditors, nor by the discretion given to the trustee as to the terms and mode of sale; nor is the assent of the creditors necessary to uphold the assignment against the liens of subsequent attachments.

England & Lee v. Reynolds, Devoe & Co...... 370

12. *Validity of deed of trust for benefit of creditors.*—A deed of trust executed by an insolvent debtor, to his mercantile partner as trustee, who is cognizant of his pecuniary circumstances, for the purpose of securing a debt due to the trustee's wife, arising from the investment of moneys belonging to her separate estate in the partnership business, and the use of the partnership assets by the grantor in payment of his individual debts; which conveys the grantor's residence and household servants, together with his interest in the partnership assets, after paying the partnership debts, then due, or afterwards created; postpones the law-day for more than three years; authorizes the retention of possession by the grantor, and the continuation of the partnership business, until the trust is closed according to its terms; and directs the trustee to settle up the partnership business, if any of the grantor's creditors should attempt to subject his interest therein to the payment of his debts, and to close the trust if default was made by the grantor in the annual payment of interest on the secured debt,—is fraudulent and void as against creditors.—Code § 1550.—*King v. Kenan*.....

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13. *Validity of voluntary conveyance as against creditors.*—A voluntary conveyance by a husband to his wife, if free from fraud, actual or constructive, will sometimes be upheld in equity, as against subsequent creditors of the husband; but proof of an intent to hinder and defraud his creditors, will avoid the deed, and render the property subject to subsequent debts.—*Williams v. Avery*.....

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14. *Validity of patent in name of deceased person.*—Prior to the passage of the act of congress approved May 20, 1836, (Brightly's U. S. Digest, 465,) a patent, issued in the name of a deceased person, was void; but, under that act, such patent vests the title in the decedent's heirs, devisees, or assignees, as if it had been issued to him during life.—*Tarver v. Smith*.....

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15. *Construction of deed, as to respective rights of trustee and beneficiaries.*—Where a female slave is conveyed by deed to a trustee, "in trust that he shall take and receive all the profits and income arising from the said slave and her increase, and apply the same to the education and maintenance of L. and H.," his two daughters, "and in trust, upon the marriage or coming of age of the said L. and H., to permit them to have the full use, authority and command over the said slave and her increase, (a division or par-

DEEDS—CONTINUED.

tition having been made,) for and during the natural lives of the said L. and H. ; and after their death, in trust further to convey the respective portions of the property to their children, in fee-simple forever,"—if the slaves are divided between the two daughters, on their marriage or coming of age, and the respective portion of each delivered to her by the trustee, he cannot afterwards, during the lives of the daughters, maintain detinue against them, or any one holding under them, to recover the slaves; and if, without making a division, he delivers all the slaves to one of the daughters, on her marriage, and afterwards conveys other property to the other daughter in lieu of her interest in the slaves, he cannot maintain detinue for the slaves, against a purchaser from the daughter to whom they were delivered.—*Humphries v. Dawson*..... 199

DEPOSITION.

1. *Waiver of notice*.—Filing cross interrogatories, without objecting to the failure to give notice of the residence of the witness and the name of the commissioner, (Session Acts 1859–69, p. 20,) is a waiver of the notice.—*Aicardi v. Strang, Murray & Co*..... 326
2. *Failure to answer cross-interrogatories fully*.—When a substantial answer is given to a cross-interrogatory, and the deposition contains nothing to show that the witness sought to evade a disclosure of facts within his knowledge, his deposition will not be suppressed on account of his failure to answer specifically all the different parts of the interrogatory.—*S. C.*..... 326
3. *Same*.—A deposition will not be suppressed, on the ground that the witness has failed to answer a cross-interrogatory, or that his answer is evasive, because, in answering the interrogatory, he only says that he refers to his answers to the direct interrogatories as containing all his knowledge on the subject.—*Black v. Black*..... 111
4. *Signature of witness*.—Where the commissioner certifies, that the witness, having read over the answers of another witness, "did solemnly swear that he would adopt them, but the steamboat, on which he was going up the river, left before he could subscribe them," the deposition cannot be read in evidence.—*Bell v. Chambers*..... 660
5. *Identification of exhibit*.—Where the commissioner certifies, "that the annexed deed, hereto attached, marked 'A,' was shown to the witness, and by him examined and recognized to be the original deed by him signed and delivered," a deed which is shown to have been enclosed in the package containing the deposition, and which is marked as stated in the certificate, is sufficiently identified as the exhibit referred to.—*Humphries v. Dawson*..... 199
6. *Offer of deposition containing both legal and illegal evidence*.—When an entire deposition is offered in evidence, the court is not bound to separate the legal from the illegal evidence which it contains, but may exclude it altogether.—*Crutcher v. M. & C. Railroad Co.*, 579

DOWER.

1. *Petition for ; averment of heirs' names.*—In a petition for dower, an averment that the decedent "left him surviving" certain children and grandchildren, whose names are specified, is not a sufficient compliance with the statutory requisition (Code, § 1361) that the petition "must contain the names of the heirs-at-law": such an averment does not negative the existence of other heirs, in addition to those whose names are specified.
Forrester v. Forrester..... 119
2. *Parties to proceedings, where land has been sold for division.*—Although the sale of a decedent's real estate, under an order of the probate court, for the purpose of making an equitable division among the heirs, does not affect the widow's right of dower; and although the statute (Code, § 1361) does not require that the name of the purchaser at such sale shall be stated in the petition for dower; yet, it is a safe and proper practice to allege the fact of such sale in the petition, and to give notice of the application to the purchaser.—*S. C.*..... 119
3. *Dissent from will.*—Where a widow executes in writing her dissent from her husband's will, and hands it to a friend, with instructions to file it in the office of the probate judge, and then dies; if the dissent is filed by the person to whom it was entrusted, after her death, but within the period prescribed by the statute, (Code, § 1610,) this is a sufficient compliance with the requisitions of the statute.—*McGrath v. McGrath's Adm'r.*,.... 246
4. *Computation of dower and distributive share.*—In estimating the widow's dower interest and distributive share of the estate of her deceased husband, the value of her separate estate is to be deducted, (Code, §§ 1991-2,) although it is greater than her dower interest alone, but less than her dower interest and distributive share added together.—*Dubose v. Dubose*..... 238
5. *Extent of widow's quarantine.*—A plantation, about eight miles distant from the husband's residence at the time of his death, and from which he drew the greater part of his provisions and household supplies, is not so connected with the residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof until her dower is assigned.—*Waters v. Williams*..... 680
6. *Action for rents, or mesne profits.*—A widow cannot maintain an action at law, to recover the rents, or mesne profits, accruing from the lands assigned as her dower, from the death of the husband, to the time her dower was allotted; her only remedy is in chancery.—*S. C.*..... 680
7. *Inchoate right of dower not available as set-off.*—An inchoate right of dower cannot be measured accurately by any pecuniary standard; consequently, damages for the breach of a promise to procure a relinquishment of such right, or to indemnify against it by bond with surety, is not available as a set-off to the purchaser, (Code, § 2240,) in an action on the notes given for the purchase-money of the lands,—*Martin v. Wharton*..... 637
8. *Sale of decedent's real estate, for division ; title to lands allotted as widow's dower.*—Where a decedent's real estate is sold, under an

DOWER—CONTINUED.

order of the probate court, for the purpose of making an equitable division among the heirs, and the lands in which the widow's dower has been allotted are included in the order and sale, the title to such lands, and the right to possession on the death of the widow, vest in the purchaser; but, if such lands are not included in the order and sale, the title descends to the heirs, with the right to possession on the death of the widow.—*Costly v. Tarver*, 107

9. *Same*; right of dower of heir's widow; jurisdiction of probate and chancery courts.—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among his heirs, after the death of one of the heirs, the sale bars the right of dower of the widow of such deceased heir, but does not extinguish her right as dowress; the proceeds of sale stand in lieu of the land itself, and the portion of the deceased heir must be paid to his administrator, for the purpose of administration; but so much thereof as corresponds with her dower interest in the land, must be paid over to the widow, on her executing a suitable bond for the protection of those entitled to the reversion; and on her failure to give such bond, the money must be loaned out, and the interest be paid to her annually during her life; but the probate court is not competent to make and execute the proper decree in such case, and resort must therefore be had to the chancery court.—*Chaney's Heirs v. Chaney's Adm'r*..... 35

EJECTMENT.

1. *What title will authorize recovery*.—In a real action in the nature of an ejectment, (Code, §§ 2209–19,) a recovery may be had on proof of prior possession by plaintiff, under color of title, unless he is barred by the statute of limitations, or unless the defendant shows a better title. A possession under color of title, within the meaning of this principle, is necessarily held with claim of right; and the defendant would show a better title, by proving an outstanding valid title in a third person, or a prior possession by himself under color of title, which he had not abandoned, and which he was not estopped from asserting against the plaintiff.—*Russell v. Erwin's Adm'r*..... 44
2. *Same*.—A transfer by a Creek Indian of his reservation under the treaty of 1832, approved by the president of the United States, confers on the transferee such title as will support an ejectment; but an assignment or transfer of such approved contract, not under seal, does not convey such title to the assignee. *Dillingham v. Brown*..... 311
Also, *Tarver v. Smith*..... 135
3. *Same*.—Where such approved contract is transferred to a partnership, each partner may maintain a separate action for his undivided interest.—*Tarver v. Smith*..... 135
4. *Who may join as plaintiffs*.—An executor, suing in his representative capacity, and the devisees under the will, cannot join as plaintiffs in a real action in the nature of an ejectment.—*S. C.* 135
5. *Conclusiveness and effect of judgment by consent*.—Where a verdict is rendered, by consent, for the plaintiff in ejectment, for the

EJECTMENT—CONTINUED.

several lots sued for; and the value of each lot, and of the improvements erected thereon by the defendants, is separately assessed; and, on the plaintiffs' declining to pay for the assessed value of the improvements, a judgment is rendered, requiring each defendant to pay to the plaintiff the assessed value of his lot, and declaring that, "on the payment of the said sums respectively, the defendants shall retain the possession of the premises, free and discharged from recovery by said plaintiff, and from all claims and actions whatever for the recovery of title or possession of said premises, and from all such claims by them and all claiming under them, then said payment shall be a bar,"—such judgment, and payment made according to its terms, divests the plaintiffs' title to the land, as between the parties to the suit and their privies, and transfers to the defendants such title as will support an ejectment; and a tenant who was in possession of a part of the premises, and was served with process in the suit, and who attorned to a purchaser from his landlord pending the suit, and whose new landlord was made a party defendant to the suit, is estopped, as against his new landlord, from denying the effect of the judgment.—*Knox v. Easton*, 345

ELECTION.

See CRIMINAL LAW, 9.

ERROR AND APPEAL.

1. *Parties to appeal*.—An appeal from a decree of the probate court, in the matter of the probate of a will, cannot be sued out by the next of kin, who, although cited, did not appear and make themselves parties to the proceedings.—*Clemens v. Patterson*..... 721
2. *Revivor of appeal*.—On the death of a sole trustee of an express trust, appointed in a foreign jurisdiction where the common law prevails, pending an appeal from a decree in chancery obtained by him here, the appeal must be revived against his successor in the trust appointed here.—*McDougald's Adm'r v. Carey*..... 320
3. *Same*.—An express trust for the benefit of creditors having been created in Georgia, where the common-law rule in reference to the succession to trust estates has been changed by statute; and the trustee having died, pending an appeal from a decree in chancery obtained by him here,—the appeal must be revived against his successor in the trust, appointed under the statute in Georgia.
S. C..... 534
4. *What is revisable*.—The refusal of the primary court to dismiss, on motion, an action brought by a corporation, on account of a failure to give security for costs at the commencement of the suit, is not revisable on error, unless an exception is reserved to it.
Tuskaloosa Wharf Co. v. Mayor &c...... 514
5. *Assignment of error not supported by exception*.—Where the exclusion of a witness is assigned as error, while the bill of exceptions shows that only a portion of the witness' testimony was excluded, the assignment of error does not cover the ruling of the court.—*Coltart v. Laughinghouse*..... 100

ERROR AND APPEAL—CONTINUED.

6. *Assignment of error not insisted on.*—In civil cases, the appellate court will notice only those assignments of error which are insisted on by the appellant's counsel in his brief or argument.—*Walker v. Sullzbacher & Paige*..... 318
7. *Error without injury.*—The exclusion of evidence which is offered to prove a fact that has been already proved, and is not denied or controverted by the opposite party, is, at most, error without injury.—*Gregory v. Walker*..... 26
8. *Same.*—The admission of evidence which, when offered, is *prima facie* inadmissible, is cured by the subsequent introduction of the necessary preliminary proof.—*Bell v. Chambers*..... 660
9. *Same.*—Where the record affirmatively shows that the plaintiff can never recover in the action, the appellate court will not, at his instance, examine into the correctness of any rulings of the primary court adverse to him, since they are, at most, error without injury.—*Bell's Adm'r v. Nichols*..... 678
10. *Same.*—The sustaining of a demurrer to a good special plea, when the defendant had the benefit of the same defense under the general issue, is error without injury.—*Lawson v. Hicks*..... 279
11. *Same.*—The ruling of the primary court, in holding the plaintiff to be a competent witness for himself, in an action against an administrator, (Code, § 2313,) is, at most, error without injury, when the record shows that he only testified to a demand under twenty dollars, as authorized by section 2779.—*Deming's Adm'r v. Hamil*..... 686
12. *Presumption in favor of judgment.*—When a plea, which was struck out on motion in the primary court, is nowhere set out in the record, the appellate court will presume that it was of such character as justified that action.—*Colten v. Bradley*..... 506
13. *Same.*—Where the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, against the appellant, that the primary court properly refused to instruct the jury, at his instance, that they must find for him if they believed the evidence.—*Fickling v. Brewer*..... 685

See, also, CHARGE OF COURT.

ESTATES OF DECEDENTS.

1. *When statute of limitations begins to run against.*—Where a decedent dies in another State, and letters testamentary or of administration on his estate are there granted by the proper tribunal, the statute of limitations of this State begins to run against his estate from the time of such appointment, although such foreign administrator may have never had his letters recorded here, as authorized by the act of 1821. (Clay's Digest, 227, § 31.)—*Bell's Adm'r v. Nichols*..... 678
2. *Extent of widow's quarantine.*—A plantation, about eight miles distant from the husband's residence at the time of his death, and from which he drew the greater part of his provisions and household supplies, is not so connected with the residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof until her dower is assigned.—*Waters v. Williams*..... 680

ESTATES OF DECEDENTS—CONTINUED.

3. *Computation of dower.*—In estimating the widow's dower interest and distributive share of the estate of her deceased husband, the value of her separate estate is to be deducted, (Code, §§ 1991-2,) although it is greater than her dower interest alone, but less than her dower interest and distributive share added together.—*Dubose v. Dubose*..... 238
4. *Sale of real estate, &c.*—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among the heirs, and the lands in which the widow's dower has been allotted are included in the order and sale, the title to such lands, and the right to the possession on the death of the widow, vest in the purchaser; but, 'if such lands are not included in the order and sale, the title descends to the heirs, with the right to the possession on the death of the widow.—*Costly v. Tarver*..... 107
5. *Same.*—Where a decedent's real estate is sold, under an order of the probate court, for the purpose of making an equitable division among his heirs, after the death of one of the heirs, the sale bars the right of dower of the widow of such deceased heir, but does not extinguish her right as dowress: the proceeds of sale stand in lieu of the land itself, and the portion of the deceased heir must be paid to his administrator, for the purpose of administration; but so much thereof as corresponds with her dower interest in the land, must be paid over to the widow, on her executing a suitable bond for the protection of those entitled to the reversion; and on her failure to give such bond, the money must be loaned out, and the interest be paid to her annually during her life; but the probate court is not competent to make and execute the proper decree in such case, and resort must therefore be had to the chancery court.—*Chaney's Heirs v. Chaney's Adm'r*..... 35
- See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. *By bond.*—In an action on a forfeited forthcoming or replevy bond, the obligors are estopped from denying the defendant's title to the property, or showing that it was not subject to the attachment.—*Mitchell v. Ingram*..... 395
2. *En pais against maker of note from setting up defenses against assignee.*
Where the maker of a promissory note, in response to an inquiry by one who is about to purchase it, states that he has no defense against it, this does not preclude him from setting up against such purchaser a defense subsequently arising out of the original contract, *e. g.*, a total failure of consideration; but, where the note is purchased by the assignee on the faith of a promise by the maker to pay it, the latter is thereby estopped from asserting the invalidity of the note as between himself and the payee, either on the ground of fraud, or subsequent failure of consideration, and will be compelled to pay the assignee at all events.—*Cloud v. Whiting*, 57
3. *En pais against administrator.*—A private sale by an administrator, in his individual capacity, of a slave belonging to his intestate,

ESTOPPEL—CONTINUED.

- tate's estate, estops the administrator from afterwards recovering the slave, but does not divest the title of the estate; and if the sale is perfected by delivery, and the administrator afterwards acquires the possession under a new contract with the purchaser, he is estopped from setting up against the latter the illegality of the original sale; consequently, a recovery against him by the purchaser, in an action founded on the subsequent contract, does not bar the title of the estate.—*Bragg v. Massie's Adm'r*..... 89
4. *Against tenant from denying landlord's title*.—A tenant, when sued for rent under an express contract, is estopped from denying the title of his landlord, or from insisting that, under section 2129 of the Code, the action should have been brought in the name of certain infants, to whom the land belonged, and whose guardian the plaintiff was.—*Griffith v. Parmley*..... 393
5. *Same*.—A tenant is estopped from denying his landlord's title, without first surrendering the possession under the tenancy; and the estoppel equally applies to his wife, living with him, and occupying simply as his wife under the tenancy, and to any third person who holds under him or his wife.—*Russell v. Erwin's Adm'r* 44
6. *Same*.—If land is given, by parol, to an infant, and his mother enters into the possession, under an agreement with the grantor to hold it for the infant, the technical relation of landlord and tenant is not thereby created between the infant and his mother; yet the mother is estopped from denying the infant's title, on the same principle which applies between landlord and tenant.—*S. C.* 44
7. *By judgment in ejectment*.—Where a verdict is rendered, by consent, for the plaintiff in ejectment, for the several lots sued for; and the value of each lot, and the improvements erected thereon by the defendants, is separately assessed; and, on the plaintiff's declining to pay for the assessed value of the improvements, a judgment is rendered, requiring each defendant to pay to the plaintiff the assessed value of his lot, and declaring that, "on the payment of the said sums respectively, the defendants shall retain the possession of the premises, free and discharged from recovery by said plaintiff, and from all claims and actions whatever for the recovery of title or possession of said premises, and from all such claims by them and all claiming under them, then said payment shall be a bar,"—such judgment, and payment made according to its terms, divests the plaintiff's title to the land, as between the parties to the suit and their privies, and transfers to the defendants such title as will support an ejectment; and a tenant who was in possession of a part of the premises, and was served with process in the suit, and who attorned to a purchaser from his landlord pending the suit, and whose new landlord was made a party defendant to the suit, is estopped, as against his new landlord, from denying the effect of the judgment.—*Knox v. Easton*.. 345

EVIDENCE.

I ADMISSIBILITY, AND RELEVANCY.

1. *Action on attachment bond; defense not limited to ground stated in affidavit*.—In an action on an attachment bond, the defense is not

EVIDENCE—CONTINUED.

- limited to proof of the particular facts stated in the affidavit for the attachment, but may be rested on the existence of any one of the several grounds which authorize the issue of an attachment. *Lockhart v. Woods*..... 631
2. *Same; proof of debtor's pecuniary condition*.—Although neither indebtedness, nor pecuniary embarrassment, nor even insolvency, on the part of a debtor, can justify the wrongful, or mitigate the malicious suing out of an attachment against him; yet, in an action on the bond, it being shown in defense that, at the time the attachment was sued out against him, he was about to dispose of his slaves, and had already disposed of his other personal property at an inadequate price, evidence of his embarrassed pecuniary condition at the time is admissible, because pertinent to the question of the *bona fides* of the conveyances.—*S. C.*..... 631
3. *Same; same*.—In such case, it is permissible for the plaintiff to rebut the evidence as to his pecuniary embarrassment, by proof of outstanding accounts due to him as a physician; but, where such proof is made by his own books, it must be accompanied with evidence showing the correctness of the accounts as charged; nor are the assessor's books, showing the amount of his taxable property as assessed that year, competent evidence for him.—*S. C.*..... 631
4. *Same; proof of other attachments*.—The defendant may show, in defense of the action, as tending to rebut the presumption of malice, the issue of another attachment, and notice thereof to himself, the day before his own attachment was sued out; *secus*, as to an attachment of which he had no notice.—*S. C.*..... 631
5. *Proof of agency*.—As a general rule, the fact of agency must be proved by other evidence than the acts of the agent himself, before it can be assumed that his acts are binding on the principal; yet, where there is any evidence of an assent on the part of the principal to the acts of the agent, or where the acts themselves are of such nature, or so continuous, as to furnish a reasonable ground of inference that they must have been known to the principal, and that he would not have permitted the agent thus to act without authority, the acts themselves are admissible evidence to prove the agency.—*Gimon v. Terrell*..... 208
6. *Fraud; rebutting evidence*.—Where an attachment is levied on a slave, and a purchaser from the defendant in attachment brings trespass against the plaintiff, and the validity of the sale is impeached, the plaintiff may show, in rebuttal of the evidence of fraud, that by the statute laws of Mississippi, where the vendor resided at the time of the sale, one slave was exempt from levy and sale under legal process against the head of a family.—*Garner v. Bridges*..... 276
7. *Fraud in execution, or illegality of consideration of deed*.—Plaintiffs claiming title to the land in controversy under a deed of gift from defendant's deceased father, which defendant sought to impeach on the grounds of non-delivery, fraud in the execution, and illegality of consideration; a written agreement between said grantor and plaintiffs' mother, an unmarried woman, which was executed several months before the deed, did not refer to the property con-

EVIDENCE—CONTINUED.

- veyed by the deed, was not referred to in the deed, and simply stipulated for the performance by plaintiffs' mother of domestic services for said grantor during his life, in consideration of which he promised to give her certain personal property at his death, and to provide board until that time for her and her said children,—is, *prima facie*, irrelevant; nor is it admissible in connection with parol evidence, which is offered "for the purpose of showing that said deed was fraudulently obtained," but which does not tend to show fraud in its execution.—*Gregory v. Walker*..... 26
8. *Probate of will; proof of mental incapacity, fraud, or undue influence.*—Where the probate of a will is contested, on the grounds of fraud, undue influence, and mental incapacity on the part of the testator, it is permissible to inquire whether the provisions of the will are just and reasonable, and consonant with the state of the testator's family relations; and proof of the value of his estate, and of the pecuniary circumstances of those relatives who, in case of intestacy, would be his heirs-at-law and distributees, is admissible evidence as bearing on this question.—*Fountain v. Brown*..... 72
9. *Same.*—In such case, it is competent for the contestants to prove that the testator was "*diseased*" before the execution of the supposed will.—*S. C.*..... 72
10. *Same.*—The fact that the testator had conveyed to third persons, before the execution of the supposed will, some of the property disposed of by it, is competent evidence for the contestants, as tending to show the failure of his memory.—*S. C.*..... 72
11. *Defamation; proof of publication.*—The fact that the cross-interrogatories to a witness, which contained the alleged defamatory words, signed by the defendant, and in his handwriting, were found in the clerk's office, tends to show a publication by him, and may go to the jury as evidence of publication.—*Lawson v. Hicks* 279
12. *Relevancy of evidence to impeach witness, and disprove declaration of party.*—Where a witness testifies to a declaration made by a party in conversation with him, the party cannot be allowed, for the purpose of impeaching the witness, and rebutting his testimony, to prove by another witness, who had known him intimately for a number of years, that he had never made any such declaration to him.—*S. C.*..... 279
13. *Proof of negligence by overseer.*—Defendant having adduced evidence showing that, during the year plaintiff was acting as overseer on his plantation, the supply of corn on the place was all consumed by June, he cannot be allowed to prove that, during the next year, under a different overseer, the number of persons, stock, &c., being the same as in the preceding year, the same quantity of corn lasted until September.—*Spiva v. Stapleton*..... 172
14. *Evidence rebutting proof of negligence.*—In such case, proof of the bad quality of the corn on the place when plaintiff took charge of it, would be competent evidence for him, in rebuttal: but proof of the bad quality of the corn raised in the neighborhood, unaccompanied with proof of any general cause affecting the crops of that neighborhood, or with evidence showing that, in quality

EVIDENCE—CONTINUED.

- of soil and mode of cultivation, defendant's plantation corresponded with the lands in the neighborhood generally, is too remote and uncertain to go to the jury for that purpose.—*S. C.*..... 172
15. *Negligent treatment of slave; rebutting evidence.*—The indictment having been found in May, 1860, and the prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that afterwards meat was supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves.—*Cheek v. The State*..... 227
16. *Proof of special contract with physician.*—In an action to recover for the value of medical services rendered by plaintiff to a third person, it is permissible for him to prove that, although he did not begin, he continued his services at the instance and request of the defendant; and, for this purpose, he may show that, when he spoke of discontinuing his visits, a telegraphic dispatch and a letter from defendant, requesting that all necessary attention be bestowed on the patient at his expense, were shown to him by the person who had received them, and who then requested him to continue his attendance.—*White v. Mastin*..... 147
17. *Same.*—In such case, defendant's dispatch being addressed to the infirmary at which the patient was confined, but authorizing the employment of persons not connected with the infirmary to perform necessary services for the patient, the fact that the defendant has paid the account contracted with the infirmary, which did not embrace the plaintiff's account, is irrelevant and inadmissible. *S. C.*..... 147
18. *Redundant evidence.*—The exclusion of evidence which is offered to prove a fact that has been already proved, and is not denied or controverted by the opposite party, is, at most, error without injury.—*Gregory v. Walker*..... 26

II. ADMISSIONS; CONFESSIONS; DECLARATIONS; RES GESTÆ.

19. *Admissions against interest.*—The declarations of a person who has possession of a slave, in disparagement of his own title, are competent evidence against him, or against a subsequent purchaser or sub-purchaser from him.—*Arthur v. Gayle*..... 259
20. *Confessions in criminal case.*—Where the prisoner, a slave, being tied, and about to be whipped, in the presence of his master and other white men, was asked why he committed the offense with which he was charged, and was told that his punishment would be lighter if he confessed the truth; a repetition of the confession thus obtained is not competent evidence against him, when it is shown to have been made on the next day, in the presence of his master, in reply to a similar question by the officer who had arrested him, and who was conveying him to jail.—*Joe v. The State*..... 422
21. *Agent's declarations, as evidence against principal.*—A person who employs an agent to seize the personal property of another with-

EVIDENCE—CONTINUED.

- out authority, is responsible to the injured party equally with the agent, although not actually present when the trespass was committed; and the acts and declarations of the agent, in the performance of the unlawful service, are competent evidence against his principal.—*Raisler v. Springer*..... 703
22. *Grantor's declarations, as against grantee*.—The declarations of the grantor, tending to impeach the validity of his deed, are not admissible evidence against the grantee, unless shown to have been made before the execution of the deed.—*Gregory v. Walker*, 26
23. *Same, for grantee*.—Where two slaves are given by a father to his two unmarried daughters, by separate gifts made at one and the same time, his declarations at the time, showing a delivery of both slaves, are competent evidence as a part of the *res gestæ*, in a controversy respecting one of the gifts; and the subsequent acts of both grantor and grantee, showing an assertion of title to the slave by the latter, and the recognition of her title by the former, are also admissible evidence.—*Bragg v. Massie's Adm'r*, 89
24. *Party's declarations, as evidence for himself*.—In an action against an administrator, seeking to charge him individually for work and labor done on a house belonging to his intestate's estate, of which he had actual possession at the time the work was done; plaintiff having proved that defendant superintended, approved, and accepted the work, and defendant having adduced evidence of a contract between plaintiff and the decedent for the performance of the work,—plaintiff cannot be allowed to prove that, "when about to commence the work, defendant not being present," he said to a witness with whom, as agent of the decedent, he had made the former contract, "that he would not do the work under the former contract, but looked to the defendant individually for payment."—*Gordon v. Clapp*..... 357
25. *Slave's declarations*.—The declarations of the slave, for whose conversion the action is brought to recover damages, are not admissible evidence for the defendant, unless shown to be a part of the *res gestæ* connected with the alleged conversion.—*Gimon v. Baldwin*..... 60
26. *Vendor's declarations, as evidence against purchaser*.—The declarations of the vendor of a slave, made several months before the sale, not explanatory of his possession or title, and not made in the presence of the purchaser, are not competent evidence against the purchaser.—*Garner v. Bridges*..... 276

III. BURDEN; WEIGHT, AND SUFFICIENCY OF PROOF.

27. *Note given as collateral security; proof of part payment of original debt*.—In an action on a note, which was given as collateral security for a debt on which the defendant was not bound, proof of the levy and sale of property under execution or attachment against the original debtor, at the suit of the plaintiff, raises the presumption of payment *pro tanto*, and casts on him the *onus* of showing that the money was taken from him by older liens, or in some other way.—*Rutledge's Adm'r v. Townsend, Crane & Co.*.... 706
28. *Delivery of deed*.—The testimony of the subscribing witness to a

EVIDENCE—CONTINUED.

- deed, to the effect that, immediately after its execution, the grantor handed it to the mother of the grantees, who were infants living with their mother, "and told her to keep it," is, at least, sufficient to let the deed go to the jury; the intention of the grantor, that it should or should not be considered as delivered, being a question for the determination of the jury, under proper instructions from the court.—*Gregory v. Walker*..... 26
29. *Execution of deed*.—Where there are no attesting witnesses to a deed, executed by the grantor in an official character, proof of his handwriting, and of his official character at the date of the deed, is sufficient proof of its execution.—*Dillingham v. Brown*..... 311
30. *Execution of will*.—Although two subscribing witnesses are necessary to the execution of a will, their testimony is not the only evidence by which the due execution of the will can be established; on the contrary, any defect in their testimony may be supplied by that of the person who wrote the will, and who was present when it was signed and attested, or by other evidence *aliunde*.—*Hall's Heirs v. Hall's Executors*..... 131
31. *Protest of foreign bill of exchange*.—In an action on a foreign bill of exchange, by an endorsee against his endorser, the only evidence of protest being the deposition of the notary, and a copy of the protest; which copy, though appended to his deposition as an exhibit, does not appear to have been certified or authenticated otherwise than by the deposition,—the court is not authorized to instruct the jury, that the deposition and exhibit "are, of themselves, sufficient evidence of the protest of the bill." *Stewart v. Russell*..... 649
32. *Physician's license*.—Under section 975 of the Code, a medical license is competent evidence, without proof of the signatures attached to it.—*White v. Mastin*..... 147
33. *Sufficiency of evidence in criminal case*.—A charge, instructing the jury "that they must find the prisoner not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt," asserts a correct legal proposition, and should be given at the request of the prisoner. *Joe v. The State*..... 422

IV. OBJECTIONS.

34. *General objection*.—A general objection to an entire question, a part of which calls for legal evidence, may be overruled entirely. *Fountain v. Brown*..... 72
35. *Offer of deposition containing both legal and illegal evidence*.—When an entire deposition is offered in evidence, the court is not bound to separate the legal from the illegal evidence which it contains, but may exclude it altogether.—*Crutcher v. M. & C. Railroad Co.* 579
36. *Error without injury in admission of evidence, prima facie, inadmissible*.—The admission of evidence which, when offered, is *prima facie* inadmissible, is cured by the subsequent introduction of the necessary preliminary proof.—*Bell v. Chambers*..... 660

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V. OPINION.

37. *Opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.—*Cheek v. The State*..... 227
38. *Same.*—In an action to recover stipulated wages as an overseer, the question being whether plaintiff performed his duty as an overseer, a witness who frequently saw the defendant's plantation while the plaintiff was in charge of it, and who is shown to have been an overseer for five or six years, may state that, in his opinion, plaintiff "managed pretty well."—*Spiva v. Stapleton*..... 171
39. *Opinion of witness on question of sanity.*—A witness who was long and intimately acquainted with the testator, may state his opinion on the question of sanity or insanity, in connection with the facts on which it is based.—*Fountain v. Brown*..... 72
40. *To what witness may testify.*—A witness cannot testify that a person "was deranged or insane"; nor that "her insanity became worse because of the conduct" of her husband and another woman; nor that a man and a woman "lived in adultery" with each other: such statements are mere conclusions, or deductions from facts, and not the facts themselves.—*Gregory v. Walker*.... 26
41. *Same.*—A witness cannot be allowed to testify that a person "was insolvent," although he states that he "knows the fact of his own personal knowledge".—*Nuckolls v. Pinkston*..... 615
42. *Same.*—A witness may testify, that a seizure of property by an officer, without lawful authority, "was made in an offensive and insulting manner."—*Raisler v. Springer*..... 703
43. *Same.*—A witness may testify, although he is not an expert, that a person was "diseased."—*Fountain v. Brown*..... 72

VI. PAROL AND WRITTEN.

44. *Admissibility of parol, to change absolute deed into mortgage.*—Parol evidence is not admissible at law, to show that a deed, absolute on its face, was intended to operate only as a mortgage.—*Bragg v. Massie's Adm'r*..... 89
45. *Same, to identify attachment.*—Where there is an immaterial variance in the description of the attachment in the replevy bond, parol evidence is admissible to explain it, and to identify the attachment.—*Mitchell v. Ingram*..... 395

VII. PARTIES.

46. *Examination of defendant as witness for co-defendant.*—A defendant, against whom there is no evidence after the plaintiff has closed, may be examined as a witness for his co-defendant (Code, § 2288); but the testimony of such defendant is not be considered by the jury, either for or against himself.—*Hurter & Hill v. Buford*..... 243
47. *Same.*—Where two persons are sued as late partners, for the price of goods sold and delivered to one of them, and a judgment by default is taken against the one to whom the goods were sold and delivered, he is a competent witness for his co-defendant, to

EVIDENCE—CONTINUED.

- disprove the alleged partnership, though he cannot be compelled to testify against his consent; and where the bill of exceptions shows that he was excluded on the plaintiff's motion, and does not show that he objected to testifying, the appellate court cannot presume that he was excluded on account of his own unwillingness to testify.—*Aicardi v. Strang, Murray & Co.*..... 326
48. *Same, against co-defendant.*—When one of several defendants is examined as a witness against his co-defendants, (Code, § 2289,) this does not make him a general witness in the cause, nor authorize his co-defendants to cross-examine him as to any matter not called out by his direct examination.—*Bell v. Chambers.*.... 660
49. *Proof of demand by plaintiff's own oath.*—The ruling of the primary court, in holding the plaintiff to be a competent witness for himself, in an action against an administrator, (Code, § 2313,) is, at most, error without injury, when the record shows that he only testified to a demand under twenty dollars, as authorized by section 2779.—*Deming's Adm'r v. Hamil.*..... 686
50. *Same; remission by plaintiff of part of demand sued for.*—In an action on an open account, commenced in a justice's court, and removed by appeal to the circuit court, the plaintiff may, by a practice long sanctioned in this State, remit the excess of his demand over twenty dollars, and thereby render himself a competent witness for himself under section 2779 of the Code.—*S. C.*..... 686

VIII. PRIMARY AND SECONDARY.

51. *Secondary evidence of deed.*—The existence and loss of a deed, executed in another State, having been proved by the admissions of the defendant's vendor; and also her declarations, to the effect that, after the loss of the original, she had procured a copy of the deed, and had it recorded here,—a transcript from the record, properly certified, is admissible evidence.—*Arthur v. Gayle.*..... 259
52. *Proof of execution of will.*—Although two subscribing witnesses are necessary to the execution of a will, their testimony is not the only evidence by which the execution of the will can be established, on the contrary, any defect in their testimony may be supplied by that of the person who wrote the will, and who was present when it was signed and attested, or by other evidence *aliunde*.—*Hall's Heirs v. Hall's Executors.*..... 131

IX. VARIANCE.

53. *Description of attachment in bond.*—The omission of seventy-four cents, in describing the attachment in the replevy bond, is an immaterial variance, which is susceptible of explanation by parol evidence of identity.—*Mitchell v. Ingram.*..... 395
54. *Action for damages by purchaser.*—In an action by the purchaser, to recover damages for a misrepresentation of the boundary lines by the vendor, in falsely stating that a mill and mill-pond were included in the tract, he cannot be allowed to prove what would have been the value of the land if the pond had been on a part of the tract different from that on which, according to the averment of the complaint, it was represented to be.—*Foster v. Kennedy,* 359

EXECUTION.

1. *Amendment*.—On motion to supersede and quash an execution, the court may allow the execution to be amended, by striking out the name of one of the defendants, so as to make it conform to the judgment on which it was issued.—*Goodman & Mitchell v. Walker* 142
2. *Lien*.—An execution, regularly continued from term to term, is a lien on the personal property of the defendant within the county, (Code, § 2456,) from the time it is first placed in the hands of the sheriff.—*King v. Kenan*..... 63
3. *Satisfaction*.—A sale of property by the sheriff, under the levy of an execution, is, *pro tanto*, a satisfaction of the execution.—*Rutledge's Adm'r v. Townsend, Crane & Co.*..... 706
4. *Application of money*.—At common law, if several executions or attachments, having equal liens, were levied on the same property, and the proceeds of sale were not sufficient to pay all the debts in full, the funds were divided equally among the several claims, irrespective of their amount; and if the sum thus distributed to any one creditor was more than sufficient to satisfy his debt in full, the surplus was equally apportioned among the other creditors.—*S. C.*..... 706
5. *Payment to sheriff after expiration of term of office*.—A sheriff has no authority, after he has gone out of office, to receive payment of an execution which he has returned; yet, if he receives the money, and pays it over to the plaintiff's attorney, by whom it is accepted as a payment, the payment is good, and the execution thereby discharged.—*Dubberly v. Black's Adm'r.*..... 193

EXECUTORS AND ADMINISTRATORS.

1. *Validity of grant of administration*.—A grant of administration as in case of intestacy, where the decedent left a nuncupative will, which has been duly admitted to probate, is voidable and revocable.—*Jennings v. Moses*..... 402
2. *Averment of appointment and right to sue as administrator*.—*Held*, that the notice in this case showed with sufficient certainty the plaintiff's appointment as administrator, and that the cause of action appertained to him in his representative capacity.—*Dubberly v. Black's Adm'r.*..... 193
3. *Foreign executor; right of action by*.—Where a decedent dies in another State, and letters testamentary, or of administration on his estate, are there granted by the proper tribunal, the statute of limitations of this State begins to run against his estate from the time of such appointment, although such foreign administrator may have never had his letters recorded here, as authorized by the act of 1821.—*Bell's Adm'r v. Nickols*..... 678
4. *Same; same*.—On the death of the sole or surviving trustee of an express trust, where the common law prevails, the title to the trust property descends to his heirs or personal representatives; but, this rule of the common law having been changed by statute in this State, the foreign executor or administrator would have no right, by virtue of his appointment, to maintain a suit here to enforce payment of a debt due to the trust out of assets belonging to the debtor.—*McDougald's Adm'r v. Carey*..... 320

EXECUTORS AND ADMINISTRATORS—CONTINUED.

5. *Private sale by administrator.*—A private sale by an administrator, in his individual capacity, of a slave belonging to his intestate's estate, estops the administrator from afterwards recovering the slave, but does not divest the title of the estate; and if the sale is perfected by delivery, and the administrator afterwards acquires the possession under a new contract with the purchaser, he is estopped from setting up against the latter the illegality of the original sale; consequently, a recovery against him by the purchaser, in an action founded on the subsequent contract, does not bar the title of the estate.—*Bragg v. Massie's Adm'r*..... 89
6. *Unauthorized sale of personalty by administrator.*—A sale of personal property by an administrator, without an order of court, or under an order which is void for want of jurisdiction in the court, is absolutely void, and will not support an action against the purchaser to recover the agreed price.—*Beene's Adm'r v. Collenberger & Co*... 647
7. *What are assets in hands of husband as executor.*—Where the wife devises to her husband, in absolute right, her interest in a plantation on which their slaves are worked in common; and bequeaths all the residue of her property to him, in trust, after the payment of her debts, for her children; the husband is chargeable, on settlement of his accounts as her executor, with the hire of her slaves during the time he retains possession of them after her death.—*Martin v. Foster's Executor*..... 689
8. *Payment by husband of debts contracted by wife dum sola.*—Under the provisions of the Code, the husband is not entitled, on settlement of his accounts as executor of his deceased wife, to a credit for debts contracted by the wife *dum sola*, and paid by him during the coverture, but not shown to have been paid at the instance or request of the wife; *secus*, as to such payments made by him after he had qualified as her executor.—*S. C.*..... 689
9. *Power and duty of executor, under will, in supporting and educating minor children.*—Where the testator directed his estate to be kept together, and his slaves to be hired out by his executor, until his youngest child attained full age or married, when the slaves were to be sold for general distribution among all his children; bequeathed to each child a pecuniary legacy, to be paid as they severally arrived at full age or married; set apart the hire of the slaves, with the proceeds of the sale of certain real estate directed to be sold, as a fund for the payment of the legacies; and added, "It is my wish, that my minor children be educated and supported out of the same fund that their legacies are to be raised out of," held, that the executor, although he was not appointed guardian of the minor children, was authorized to disburse from the proper fund whatever might be necessary for their support and education.—*Smith v. Kennard's Executor*..... 695
10. *Liability for interest.*—An executor will not be charged with compound interest, on the final settlement of his accounts in equity, unless it appears that he has been guilty of such gross neglect in the execution of the trust as to be evidence of a corrupt intention.—*S. C.*..... 695

EXECUTORS AND ADMINISTRATORS—CONTINUED.

11. *Compensation.*—To deprive an executor of all right to compensation, it must appear that he has been guilty of gross negligence, or willful default, resulting in injury to the estate.—*S. C.*..... 695
12. *Solicitor's fees, and costs.*—In this case, (bill filed by legatees against executor, for recovery of legacies, account and settlement,) it appearing that the protracted litigation was caused by the equal fault of both parties, one-half of the executor's counsel fees, and one half of the costs, were imposed upon the executor individually, and the other half ordered to be paid out of the trust fund.—*S. C.*..... 695

FORCIBLE ENTRY, AND UNLAWFUL DETAINER.

1. *Sufficiency of complaint; averment of possession.*—An averment that the plaintiff was "lawfully and peaceably possessed of a leasehold interest or estate in the following premises," is not a sufficient averment of actual possession.—*Townsend v. Van Aspen*, 572
2. *Same; averment of entry and detainer.*—An averment that the defendant "forcibly and unlawfully entered upon said premises, and now, although he has been notified in writing to quit said premises, still forcibly detains the same, and unlawfully refuses to quit," though fuller than necessary, is substantially good.—*S. C.* 572
3. *Same; description of premises.*—"The following premises, situated in the city of Mobile, and known and described as follows: all that certain piece, parcel, or lot of land, known as No. 268 of the Orange Grove tract, situated on the corner of Jackson and Lipscomb streets, in the city of Mobile,"—is a sufficient description of the premises in controversy.—*S. C.*..... 572
4. *Recovery by plaintiff after expiration of lease.*—Since the question of title is not in issue in action of forcible entry and detainer, (Code, § 2859,) the fact that the plaintiff's lease, under which he was in possession at the time of the defendant's entry, has expired before the trial, is no bar to a recovery by him.—*S. C.*, 572

FRAUD.

1. *What constitutes fraud by vendor.*—To constitute a fraud on the part of the vendor, in misrepresenting the location of the boundary lines of the land and the capacity and quality of mills situate on the lands, it is not necessary that the representations should be known by him to be false, nor that they should be made under circumstances manifesting a recklessness of truth on his part. *Foster v. Kennedy's Adm'r* 359
2. *Same.*—A representation by the vendor, as to the location of the boundary lines of the land, or as to the capacity and qualities of a mill situated thereon, cannot be declared, as matter of law, the statement of an opinion; but it is a question for the jury to decide, whether it is the statement of an opinion or a fact.—*S. C.*..... 359
3. *Same.*—A statement by the vendor, made pending the negotiations between him and the purchaser, to the effect that his wife, if she survived him, would only be entitled to dower in the lands of which he died seized and possessed, and not in lands sold and

FRAUD—CONTINUED.

conveyed by him during the coverture, is a misrepresentation as to a matter of law, and does not constitute a fraud.—*Martin v. Wharton*..... 637

FRAUDS, STATUTE OF.

1. *Contract for sale of land, &c.*—A promise by the vendor, made pending the negotiations between him and the purchaser, to procure a relinquishment of his wife's right to dower in the lands, is within the statute of frauds (Code, § 1551).—*Martin v. Wharton*.. 637
2. *Contracts required to be in writing; averment of.*—In pleading or declaring on a contract which is required to be in writing, (Code, § 1551.) it is not necessary to aver that it was reduced to writing.—*S. C.*..... 637
3. *What is general assignment.*—A deed, by which a debtor conveys to a trustee, for the benefit of certain specified creditors, substantially all the property he holds subject to legal process in this State, is a general assignment, (Code, § 1556,) and enures to the benefit of all his creditors equally.—*Longmire v. Goode & Ulrick*. 518
4. *Validity of assignment for benefit of creditors; assent of beneficiaries.*—An assignment, by which a debtor conveys to a trustee, for the benefit of all his creditors equally, all his property, real and personal: and which authorizes the trustee "to sell and dispose of the said real and personal estate, and to collect the said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or private contract, and with the right to compound for the said choses in action, taking a part of the whole, when he shall deem it expedient so to do,"—is not vitiated by the general description of the property conveyed, nor by the failure to specify the names of the creditors, nor by the discretion given to the trustee as to the terms and mode of sale; nor is the assent of the creditors necessary to uphold the assignment against the liens of subsequent attachments.—*England & Lee v. Reynolds, Devoe & Co.*..... 370
5. *Validity of deed of trust for benefit of creditors.*—A deed of trust executed by an insolvent debtor, to his mercantile partner as trustee, who is cognizant of his pecuniary circumstances, for the purpose of securing a debt due to the trustee's wife, arising from the investment of moneys belonging to her separate estate in the partnership business, and the use of the partnership assets by the grantor in payment of his individual debts; which conveys the grantor's residence and household servants, together with his interest in the partnership assets, after paying the partnership debts, then due, or afterwards created; postpones the law-day for more than three years; authorizes the retention of possession by the grantor, and the continuation of the partnership business, until the trust is closed according to its terms; and directs the trustee to settle up the partnership business, if any of the grantor's creditors should attempt to subject his interest therein to the payment of his debts, and to close the trust if default was made by the grantor in the annual payment of interest on the

FRAUD, STATUTE OF—CONTINUED.

secured debt,—is fraudulent and void as against creditors.—Code, § 1550.—*King v. Kenan*.....

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6. *Validity of voluntary conveyance as against creditors*.—A voluntary conveyance by a husband to his wife, if free from fraud, actual or constructive, will sometimes be upheld in equity, as against subsequent creditors of the husband; but proof of an intent to hinder and defraud his creditors, will avoid the deed, and render the property subject to subsequent debts.—*Williams v. Avery*,.... 115
7. *Validity of mortgage*.—The case of *Walthall's Executors v. Rives, Battle & Co.*, (34 Ala. 91,) as to the validity of a mortgage given to indemnify a surety, re-affirmed.—*Rives, Battle & Co. v. Walthall's Executors*..... 329

GARNISHMENT.

1. *Lien*.—A judgment creditor, who sues out process of garnishment against the judgment debtor of his debtor, acquires a lien by the service of the garnishment, which will prevail over an equitable set-off afterwards acquired by the garnishee against the judgment.—*Warfield v. Campbell*..... 527
2. *Liability of trustee as garnishee*.—Where the answer of a garnishee states, that he is the trustee in a deed of trust executed by the defendant,—the validity of which is not assailed for fraud, and which provides for the conversion of the assets into money, the payment of certain preferred creditors, and the distribution of the residue among all the other creditors equally; that he has paid the preferred debts, and that the balance remaining in his hands is not sufficient to satisfy in full the unpreferred debts,—no judgment can be rendered against him on the answer, although he does not specify the names of any of the unpaid creditors.—*Lightfoot v. Rupert & McClelland*..... 666

GIFT.

1. *Remainder by parol gift*.—In this State, a remainder in personal property cannot be created by parol gift.—*Ragsdale v. Norwood*, 21

GUARDIAN AND WARD.

1. *Marriage of female guardian*.—The marriage of a woman, who has been appointed and qualified as guardian of her infant children by a former husband, has the effect of joining her husband with her in the guardianship.—*Martin v. Foster's Executor*..... 688
2. *Charge for board of ward allowable to guardian, but not as executor*. There is no principle of law, which denies to the husband, who, by marriage, became guardian jointly with his wife of her infant children by a former husband, the right to charge his wards a reasonable sum for their board; but he cannot claim a credit for their board or tuition, on settlement of his accounts as executor of his deceased wife's will.—*S. C.*..... 688

HABEAS CORPUS.

See CRIMINAL LAW, 17.

CONSTITUTIONAL LAW, 2, 3, 4.

HUSBAND AND WIFE.

1. *Husband's marital rights in and to wife's personalty.*—Prior to the passage of the laws securing to married women their separate estates, the husband's marital rights attached to a slave given to his wife, while unmarried, by her father, unless the terms of the gift secured the property to the separate use of the daughter; and on a subsequent exchange of the slave for another, during the coverture, by and with the assent of the husband, his marital rights equally attached to the slave obtained by the exchange. *Bragg v. Massie's Adm'r*..... 89
2. *Same.*—The possession of one tenant in common being the possession of both, the husband's marital rights attach to slaves which are in the possession of a person who is a tenant in common with his wife.—*Williams v. Avery*..... 115
3. *Same.*—At common law, if personal property was given to the wife during coverture, without words creating in her a separate estate, and passed into the possession of the husband, his marital rights thereby attached; and no subsequent declarations on his part, disclaiming title in himself, and acknowledging that the property belonged to his wife, could divest his title at law, so as to enable the wife to defeat an action by his personal representative; but, if the husband disclaimed all title to the property before the title vested in him, and elected to receive and hold the property merely as trustee for the wife, and died while so holding the possession, his personal representative could not recover the property from the surviving wife, even though such disclaimer and election on his part were founded in ignorance or mistake as to his legal rights; and in case of such original disclaimer and election by the husband, his subsequent declarations, asserting title in himself, and the payment of taxes on the property as his own, though they are circumstances to which the jury may look in determining his intention in reference to the property, did not, as matter of law, operate a change of the title from the wife to himself.—*Machen's Executor v. Machen*..... 364
4. *Separate estate of wife; how created.*—In a deed of gift to an unmarried woman, a provision declaring that, "should she hereafter marry, the said property is not to be subject to the debts of her husband," does not create a separate estate in the donee.—*Lewis v. Elrod*..... 17
5. *Same; same.*—A conveyance of a slave to "R. W., wife of W. W., and her bodily heirs, to their exclusive use, benefit, and behoof," creates a separate estate in R. W., to the exclusion of the marital rights of her husband.—*Williams v. Avery*..... 115
6. *Same; same.*—It is settled in this State, that a valid gift of personal property, to the separate use of a married woman, may be made orally.—*Machen's Executor v. Machen*..... 364
7. *Same; how conveyed or charged.*—The separate estate of a married woman, held under the provisions of the Code, can only be conveyed by her and her husband jointly, by instrument of writing attested by two witnesses, (§ 1987,) and cannot be subjected in equity to the payment of her debts or contracts; and, by virtue of section 1997, the same principle applies to property held by her

HUSBAND AND WIFE—CONTINUED.

- under the acts of 1848 and 1850, where the debt or contract has been incurred or entered into since the 17th January, 1853, when the Code became operative.—*Warfield v. Ravesies and Wife*..... 518
8. *Same, under chancery decree; in whom legal title vests*.—Where the future earnings of a married woman are settled on a trustee for her separate use, by a decree in chancery rendered under the 4th section of the act of January 31, 1846, and she afterwards purchases a slave with her separate earnings, the legal title vests in the trustee to whom the vendor's bill of sale purports to convey it for her separate use, and not in the trustee named in the decree. *Nuckolls v. Pinkston*..... 615
9. *Acknowledgment of deed by married woman*.—The case of *Boykin v. Rain*, (28 Ala. 332,) as to the sufficiency of the acknowledgment of a deed by a married woman under the act of 1803, (Clay's Digest, 155, § 27,) re-affirmed.—*Ala. Life Insurance & Trust Co. v. Boykin*..... 510
10. *Payment by husband of debts contracted by wife dum sola*.—Under the provisions of the Code, the husband is not entitled, on settlement of his accounts as executor of his deceased wife, to a credit for debts contracted by the wife *dum sola*, and paid by him during the coverture, but not shown to have been paid at the instance or request of the wife; *secus*, as to such payments made by him after he had qualified as her executor.—*Martin v. Foster's Executor*..... 688
11. *What are assets in hands of husband as executor*.—Where the wife devises to her husband, in absolute right, her interest in a plantation on which their slaves are worked in common; and bequeaths all the residue of her property to him, in trust, after the payment of her debts, for her children; the husband is chargeable, on settlement of his accounts as her executor, with the hire of her slaves during the time he retains possession of them after her death.—*S. C.*..... 688
12. *Marriage of female guardian*.—The marriage of a woman who has been appointed and qualified as guardian of her infant children by a former husband, has the effect of joining her husband with her in the guardianship.—*S. C.*..... 688
13. *When wife may come into equity*.—A married woman cannot come into equity, to protect her interest in slaves, which she claims under a verbal gift, against subsequent execution creditors of the grantor; nor where she claims under a deed of gift, and shows by her bill that the trustee, to whom the legal title was conveyed for her use, has interposed a claim at law.—*Kirksey v. Stewart & Lucius*..... 692

INDIAN RESERVATIONS.

1. *Approved contract of sale*.—A transfer by a Creek Indian of his reservation under the treaty of 1832, approved by the president of the United States, confers on the transferee such title as will support an ejectment; and where the grantees are a partnership, each partner may maintain a separate action for his undivided interest.—*Tarver v. Smith*..... 135
- Also, *Dillingham v. Brown*..... 311

INDIAN RESERVATIONS—CONTINUED.

2. *Assignment of approved contract.*—An assignment, not under seal, of an approved contract for the sale and purchase of an Indian reservation, although it does not convey to the assignee the title conferred by the approved contract, is nevertheless sufficient to authorize the issue of a patent to him; and the validity of a patent, subsequently issued to the assignee, is not affected by the fact that the assignment was not under seal.—*S. C.*..... 135, 311

INDICTMENT.

See CRIMINAL LAW, 7, 8.

INJUNCTION.

See BONDS, 6, 7, 8.

CHANCERY, 4, 5, 6, 7.

INSOLVENT ESTATES.

1. *What is sufficient filing of claim.*—The verification of a claim against an insolvent estate is not filed within the meaning of the statute, (Code, § 1847,) when it is merely placed by the creditor's attorney in the probate judge's office, in the box appropriated to such papers, without the knowledge of the judge or his clerk, and without calling the attention of either of them to it until after the expiration of the nine months prescribed by the statute for the filing of claims.—*Phillips, Goldsby & Blevins v. Beene's Adm'r.*.... 248
2. *Verification of claim.*—An affidavit, made by an agent, who states that "he knows the within claim is just, true, and unpaid," is a sufficient verification of a claim against an insolvent estate (Code, § 1847); but, if the affidavit describes the claim as "charged against the estate of *Jesse B. deceased*," instead of *Benjamin Y. B.*, it will not support a decree allowing the claim.—*Beene's Adm'r v. Collenberger & Co.*..... 647

INTEREST.

See CHANCERY, 16.

EXECUTORS AND ADMINISTRATORS, 10.

JOINT TENANTS, AND TENANTS IN COMMON.

1. *Action between.*—If one tenant in common of a remainder in slaves, during the existence of the particular estate, obtains possession of the slaves, and sells and conveys them as his absolute property, his co-tenant may maintain a special action on the case against him.—*Arthur v. Gayle.*..... 259
2. *Possession.*—The possession of one tenant in common is, in law, the possession of both.—*Williams v. Avery.*..... 115

JUDGMENTS.

1. *Conclusiveness.*—A judgment in an action of trespass to try titles, which recites that the defendant has voluntarily abandoned the possession of the land, with all claim of title thereto; that the plaintiff has taken possession; and that thereupon came a jury, who assessed the plaintiff's damages; and by which

JUDGMENTS—CONTINUED.

- it is considered by the court, that the plaintiff recover of the defendant the damages so assessed,—does not preclude the defendant, in a subsequent chancery suit to redeem the land, instituted by him as an assignee of the equity of redemption, from insisting that the recovery was based on a mortgage to a partnership, of which the plaintiff was a member, and that the mortgagees are therefore chargeable with the amount received by the plaintiff under the judgment.—*Barron, Meade & Co. v. Paulling*, 292
2. *Same.*—Where the plaintiff consents of record, on motion for a new trial by the defendant, that the verdict may be reduced to a specified sum, for which a judgment is thereupon rendered in his favor; and the judgment further recites, “that this agreement between the parties is made and entered into as a compromise and final settlement of the matters and things in controversy in this suit,”—the defendant is not thereby precluded, in a subsequent chancery suit, instituted by him as an assignee of the equity of redemption, against the plaintiff as mortgagee, from insisting that the amount paid by him under the judgment shall be credited on the mortgage debt.—*S. C.*..... 292
3. *Same.*—Where a verdict is rendered, by consent, for the plaintiff in ejectment, for the several lots sued for; and the value of each lot, and of the improvements erected thereon by the defendants, is separately assessed; and, on the plaintiff's declining to pay for the assessed value of the improvements, a judgment is rendered, requiring each defendant to pay to the plaintiff the assessed value of his lot, and declaring that, “on the payment of the said sums respectively, the defendants shall retain the possession of the premises, free and discharged from recovery by said plaintiff, and from all claims and actions whatever for the recovery of title or possession of said premises, and from all such claims by them and all claiming under them, then said payment shall be a bar,”—such judgment, and payment made according to its terms, divests the plaintiff's title to the land, as between the parties to the suit and their privies, and transfers to the defendants such title as will support an ejectment; and a tenant who was in possession of a part of the premises, and was served with process in the suit, and who attorned to a purchaser from his landlord pending the suit, and whose new landlord was made a party defendant to the suit, is estopped, as against his new landlord, from denying the effect of the judgment.—*Knox v. Easton*, 345
4. *Same.*—A judgment at law in favor of the plaintiff, in an action by a riparian proprietor to recover damages for an unauthorized diversion of water from the stream, is not conclusive evidence in his favor, in a chancery suit instituted by him against the defendant to restrain a diversion of the water, unless the identity of the cause of action in the two suits is shown.—*Potier's Executors v. Burden*..... 651
5. *When judgment final may be rendered without jury.*—In an action on an open account for goods sold and delivered, and to recover money paid by plaintiff for defendant, the court is not authorized

JUDGMENTS—CONTINUED.

- to render judgment final by default, or *nil dicit*, without the intervention of a jury.—*Porter v. Burleson & Davis*..... 343
6. *Payment to clerk*.—A clerk has no authority, before judgment, to receive payment of the plaintiff's debt; yet, if he receives the money from defendant before judgment, retains it in his hands until after judgment, and then manifests, by some plain and unequivocal act, his intention to hold it in his official capacity as clerk, the payment is good, and the judgment thereby discharged.—*Governor v. Read*..... 252

JURISDICTION.

1. *Of probate court, to order sale for partition*.—Where slaves are bequeathed by a testator to his daughter, "for the use of said daughter and her children," the probate court has no jurisdiction under the act approved February 5, 1856, (Session Acts, 1855-6, p. 20,) to order a sale of the slaves for partition, on the application of the guardian of the children.—*Wimberly v. Wimberly*..... 40
2. *Of probate judge, to revise proceedings of magistrate under peace-warrant*.—A probate judge has no jurisdiction, on *habeas corpus* or otherwise, to revise an order made by a justice of the peace, requiring a party to give security to keep the peace, and directing his imprisonment until such security is given; the only mode of revising the action of the justice, is by an appeal to the circuit court under section 3351 of the Code.—*Coburn, Ex parte*, 237
3. *Of register in chancery, sitting for probate judge*.—When the probate judge is incompetent to preside in the matter of the probate of a will, (Code, §§ 560, 1910-12,) the proceedings are not required to be instituted in the probate court, and thence transferred to the register in chancery, but may be commenced before the register; nor is it necessary, in such case, that the petition, propounding the will for probate, should show the incompetency of the probate judge, when his incompetency is otherwise shown by the record,—as by a recital in the minute-entry that the contestant is his mother-in-law.—*Hooks v. Barnett's Executor*..... 607
4. *Of special supreme court*.—When two of the judges of the supreme court are incompetent to sit in a cause, and the remaining judge, being of opinion that the judgment of the court below ought to be reversed, certifies the facts to the governor for the appointment of a special court, (Code, § 573,) and then goes out of office, before the cause is decided by the special court,—the authority of such special court is at an end; and if the succeeding judge is competent to sit in the cause, it must be heard before him; and if he is of opinion that the judgment should be affirmed, his judgment is of the same force and effect as if it were the judgment of a majority of the supreme court.—*Goodman & Mitchell v. Walker*..... 142
5. *Of justice of the peace in criminal cases*.—A justice of the peace has no authority, under our statutes, to issue a warrant for the arrest of a person in his county, on an affidavit charging him with the commission of a criminal offense in another county;

JURISDICTION—CONTINUED.

such warrant, therefore, and all proceedings had under it, are absolutely void.—*Woodall v. McMillan*..... 622
See, also, CONSTITUTIONAL LAW, 2, 3, 4.

JURORS AND JURY.

1. *Competency of juror*.—An assault with intent to commit murder is "an offense of the same character" as murder, within the meaning of the statute (Code, § 3583) defining the grounds of challenge to jurors in criminal cases.—*Crockett v. The State*..... 387
2. *Waiver of jury trial*.—In a summary proceeding against a sheriff, for failing to make the money on a *fi. fa.*, if the defendant makes default, it is the duty of the court to render judgment on the evidence, (Code, § 2599,) without the intervention of a jury.—*Andrews v. Keep*..... 315
3. *When judgment final may be rendered without jury*.—In an action on an open account for goods sold and delivered, and to recover money paid by plaintiff for defendant, the court is not authorized to render judgment final by default, or *nil dicit*, without the intervention of a jury.—*Porter v. Burleson & Davis* 343
See, also, CHARGE OF COURT.

JUSTICE OF THE PEACE.

1. *Criminal jurisdiction*.—A justice of the peace has no authority, under our statutes, to issue a warrant for the arrest of a person in his county, on an affidavit charging him with the commission of a criminal offense in another county; such warrant, therefore, and all proceedings had under it, are absolutely void.—*Woodall v. McMillan*..... 622
2. *Proof of demand by plaintiff's own oath*.—The ruling of the primary court, in holding the plaintiff to be a competent witness for himself, in an action against an administrator, (Code, § 2313,) is, at most, error without injury, when the record shows that he only testified to a demand under twenty dollars, as authorized by section 2779.—*Deming's Adm'r v. Hamil*..... 686
3. *Same; remission by plaintiff of part of demand sued for*.—In an action on an open account, commenced in a justice's court, and removed by appeal to the circuit court, the plaintiff may, by a practice long sanctioned in this State, remit the excess of his demand over twenty dollars, and thereby render himself a competent witness for himself under section 2779 of the Code.—*S. C.*..... 686

LANDLORD AND TENANT.

1. *What creates relation; estoppel en pais*.—If land is given, by parol, to an infant, and his mother enters into the possession, under an agreement with the grantor to hold it for the infant, the technical relation of landlord and tenant is not thereby created between the infant and his mother; yet the mother is estopped from denying the infant's title, on the same principle which applies between landlord and tenant.—*Russell v. Erwin's Adm'r*..... 44
2. *Attornment to stranger; adverse possession*.—An attornment by a tenant to a stranger, who claims to own the land, although it

LANDLORD AND TENANT—CONTINUED.

- may be ineffectual to create the relation of landlord and tenant between them, because of an estoppel against the tenant in favor of the landlord under whom he entered, nevertheless destroys the adverse character of his possession as against such claimant.—*S. C.* 44
3. *Same.*—As against all persons except the mortgagee and those claiming under him, the mortgagor is considered the owner of the land, so long as he remains in possession; and if the mortgagee does not disturb the possession of the mortgagor's tenant, nor otherwise assert his rights under the mortgage, an attornment by the tenant to a subsequent purchaser from the mortgagor is valid and effectual as between themselves.—*Knox v. Easton*,..... 345
4. *Estoppel against tenant from denying landlord's title.*—A tenant is estopped from denying his landlord's title, without first surrendering the possession under the tenancy; and the estoppel equally applies to his wife, living with him, and occupying simply as his wife under the tenancy, and to any third person who holds under him or his wife.—*Russell v. Erwin's Adm'r*..... 44
5. *Same.*—A tenant, when sued for rent under an express contract, is estopped from denying the title of his landlord, or from insisting that, under section 2129 of the Code, the action should have been brought in the name of certain infants, to whom the land belonged, and whose guardian the plaintiff was.—*Griffith v. Parmley* 393

LEGACY AND DEVISE.

1. *Bequests to charity held valid.*—An executory bequest of money to "Pilgrims' Rest Association," "to be loaned out by commissioners to be appointed by said association, and the interest to be equally divided annually between the ministers having charge of churches in said association;" and a similar bequest to "*Vienna and Cochran's Mill Beat*," to be received and loaned out by three commissioners elected by the people of the beats, the interest to be collected annually, "and applied by said commissioners to the education and tuition of all the pauper and poor children of said beats whose parents are not able to support them,"—are both valid, and will be upheld in equity.—*Williams v. Pearson*..... 299
2. *Bequest to daughter "and begotten heir or heirs of her body," with executory bequest over to charity.*—Where the testator, after giving several specific legacies, by the sixth clause of his will, bequeathed "the residue" of his property, which was described as consisting of a tract of land and certain slaves, to his daughter, "and the begotten heir or heirs of her body;" then directed "the balance" of his estate to be sold, and the proceeds of sale, after payment of his debts, to go to his daughter; and, by the seventh clause, directed that, "if she should die without a surviving heir or heirs of her body," "all her property" should be sold, "and all her estate be equally divided into two parts," which he bequeathed to valid charities,—held, that the executory bequests included the *corpus* of all the property given to the daughter by the sixth clause, but did not include the rents,

LEGACY AND DEVISE—CONTINUED.

- income, and profits of the estate, remaining undisposed of at her death, since they vested in the daughter absolutely.—*S. C.*..... 299
3. *Bequest to children and "heirs of their body," with executory devise over.*—Where a testator devises and bequeaths property, real and personal, to each of his children; declaring, in a subsequent clause, "all of the above property is given and bequeathed to my children and the heirs of their body, and for their proper benefit and use, and not to be disposed of by the husbands of my said daughters, and to revert to my family in all cases where my children may die without issue"; and adding, "this item is merely intended to entail the property given to my sons, as far as can be done consistently with the laws of the country,"—an absolute estate is thereby vested in a son who survives the testator, and then dies leaving children, and such children take nothing under the will.—*Goldsby v. Goldsby's Adm'r.*..... 404
4. *Bequest to grand-son, with limitation over on his death without wife or child.*—Where a testator bequeathed to his grand-son certain slaves, a specified sum of money, and a quantity of old sterling plate, and added to the bequest these words, "But, if said grand-son should die, leaving a wife, but no child, nor the descendants of any child, in that case it is my will, that his wife shall take the interest in the estate devised to him by me, to which the laws of Alabama would entitle her if he were seized and possessed of the same in fee-simple, and the balance of said estate I will to be divided equally between my three eldest sons or their families,"—*held*, that the absolute interest in the property vested in the grand-son, subject to be divested by the happening of the specified contingency; and that on his death, leaving neither wife, child, nor descendant, the title passed to his administrator, and the testator's three eldest sons took nothing. *Sherrod v. Sherrod's Adm'r.*..... 537
5. *Abatement of specific and residuary legacies.*—An executor, who is also residuary legatee under the will, cannot maintain a bill in equity against the specific legatees, for an abatement of their legacies, on account of expenses incurred by him after paying their legacies in full, when it appears that he has received, as residuary legatee, more than the entire amount of the expenses so incurred, and that he voluntarily paid the specific legacies without requiring refunding bonds from the legatees.—*White v. Easters*..... 154
6. *Marshalling assets among legatees.*—Where the expenses of supporting and educating minor children are charged exclusively upon a specific fund, upon which certain pecuniary legacies are charged, but the latter are not limited to that specific fund, a court of equity will, if necessary, so marshal the securities as to give to the former charge a priority of payment out of the specific fund. *Smith v. Kennard's Executor.*..... 695

LIBEL AND SLANDER.

1. *When action lies for words used in judicial proceeding.*—Words, spoken or written, in the course of a judicial proceeding, by the court,

LIBEL AND SLANDER—CONTINUED.

- the parties, or the counsel, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that they were relevant, and had reasonable or probable cause so to believe; nor in any case, without proof of actual malice.—*Lawson v. Hicks*..... 279
2. *Averment of want of probable cause*.—An averment that the alleged defamatory words were irrelevant, and were used "without justifiable cause or excuse," is not equivalent to an allegation of the want of probable or reasonable cause.—*S. C.*..... 279
3. *What is available defense under general issue*.—Where the alleged defamatory words were contained in cross-interrogatories propounded to a witness in a former suit between the parties, it is a good defense under the general issue, that the defendant propounded the interrogatories for the purpose of laying a predicate to impeach the witness, and honestly believed that he had the right so to do.—*S. C.*..... 279
4. *Proof of publication*.—In such case, the fact that the cross-interrogatories to a witness, which contained the alleged defamatory words, signed by the defendant, and in his handwriting, were found in the clerk's office, tends to show a publication by him, and may go to the jury as evidence of publication.—*S. C.*..... 279
5. *Proof of relevancy*.—The mere fact that a deposition, taken on interrogatories and cross-interrogatories, was read in evidence on the trial, does not justify the conclusion, as matter of law, that the cross-interrogatories called for relevant matter.—*S. C.*..... 279

LIEN.

1. *Of attachment and mortgage*.—Where an attachment is levied on mortgaged property before the mortgage is left with the proper officer for registration, its lien is superior to that of the mortgage. *Hardaway v. Semmes*..... 657
2. *Of attorney*.—An attorney-at-law has a lien on a judgment or decree recovered for his client, to the extent of his fees for services rendered in the cause, which will prevail over an equitable set-off afterwards acquired by the defendant.—*Warfield v. Campbell*..... 527
3. *Of execution*.—An execution, regularly continued from term to term, is a lien on the personal property of the defendant within the county, (Code, § 2456,) from the time it is first placed in the hands of the sheriff.—*King v. Kenan*..... 63
4. *Of garnishment*.—A judgment creditor, who sues out process of garnishment against the judgment debtor or his debtor, acquires a lien by the service of the garnishment, which will prevail over an equitable set-off afterwards acquired by the garnishee against the judgment.—*Warfield v. Campbell*..... 527
5. *On steamboats and vessels*.—The statute giving a lien on steamboats and other vessels, for work done or materials supplied, and for the wages of the officers, laborers, and crew, (Code, § 2692,) makes no distinction between the two classes of creditors... *McClure v. Steamboat James Dellett*..... 336

LIMITATIONS, STATUTE OF.

1. *Against whom statute runs.*—Although the statute of limitations does not run against the United States, it runs against any private individual who holds such a legal title as, without a patent, will support an ejectment.—*Dillingham v. Brown*..... 311
 2. *Same.*—The act of 1843, (Clay's Digest, 329, § 93,) which prescribes ten years as the limitation to actions for the recovery of lands, does not apply to actions by the State, since the State is neither expressly named, nor clearly intended to be included in its provisions; but this principle does not extend to a suit brought in the name of the State, for the use of a particular township, to recover lands which constituted a part of the sixteenth section.—*Miller v. The State*..... 600
 3. *When statute begins to run against decedent's estate.*—Where a decedent dies in another State, and letters testamentary or of administration on his estate are there granted by the proper tribunal, the statute of limitations of this State begins to run against his estate from the time of such appointment, although such foreign administrator may have never had his letters recorded here, as authorized by the act of 1821. (Clay's Digest, 227, § 31).—*Bell's Adm'r v. Nichols*..... 678
 4. *Limitation of action on covenants in lease.*—Under the law which was of force before the adoption of the Code, (Clay's Digest, 327, § 81,) sixteen years was the limitation of an action to recover the rent reserved by a lease under seal; and where the cause of action accrued before the Code went into operation, that statute applies, by virtue of the act approved February 15, 1854.—Session Acts 1853-4, p. 71.—*Cage & Salter v. Phillips*..... 382
 5. *Limitation of criminal prosecution.*—An indictment for selling liquor to a slave, "whose name and whose owner are unknown to the jurors," although fatally defective on demurrer, contains a sufficient description of the offense charged to uphold a recognizance, based thereon, for the appearance of the defendant at the next term to answer a new indictment; and if a new indictment is found at the next term, although after the lapse of twelve months from the commission of the offense, (Code, §§ 3374, 3376,) the statute of limitations is no bar to the prosecution.—*Foster v. The State*..... 425
- See, also, ADVERSE POSSESSION.

LUNATICS.

1. *Inquisition to be had before probate judge.*—Under the provisions of the Code (§§ 2750-53,) an inquisition of lunacy must be tried before the probate judge, who must preside at the trial, administer the oath to the jurors, and receive their verdict when rendered: if the trial is had before the sheriff, in the absence of the probate judge, the proceedings are *coram non judice* and void.—*Laughing-house v. Laughinghouse*..... 257

MARSHALLING ASSETS.

See CHANCERY, 8, 9.

MORTGAGE.

1. *Absolute deed held mortgage*.—A deed, absolute on its face, which is shown to have been intended to secure an antecedent debt, and to have been accompanied with a parol agreement that, on the payment of the debt within a reasonable time, the land should be conveyed to the grantor, will be treated in equity as a mortgage.
Wells v. Morrow..... 125
2. *Absolute bill of sale and defeasance together construed as mortgage*.
A bill of sale for a slave, which is absolute on its face, and which recites the payment of a consideration much less than the real value of the slave; and a defeasance executed by the purchaser on the same day, by which he agrees to reconvey the slave at the end of the year, provided he should then be alive, and provided the vendor should pay him the amount of a debt then existing, and any other debt which he might contract during the year,—construed together, constitute a mortgage.—*Davis v. Hubbard*..... 135
3. *Difference between mortgage and conditional sale*.—A conveyance, in the usual form of a deed of bargain and sale, which recited as its consideration the present payment of \$600 by the grantee (P.) to the grantor (M.), and contained the usual covenants of warranty, with a stipulation added in these words: "Now it is agreed between the parties, and is hereby made a part of this obligation, that if the said M. pay, or cause to be paid unto the said P., on or before the 1st day of January next, the sum of \$600, which amount the said P. this day paid to him in consideration of the above purchase, then this obligation to be void, else to remain in full force and effect,"—held a mortgage, and not a conditional sale, on proof that it was executed for the purpose of indemnifying the grantee against liability on certain notes executed by him for the accommodation of the grantor, to be discounted by a third person for the benefit of the grantor, and amounting in the aggregate to the sum specified as the consideration of the deed.—*Pearson v. Seay*..... 643
4. *Registration of mortgage; respective liens of mortgage and attachment*.—The statute which declares mortgages of personal property inoperative, as against creditors and purchasers without notice, until recorded, (Code, § 1291,) applies to a mortgage in another State, between parties who are non-residents of this State, if the property has a fixed *situs* here at the time; and if an attachment is levied on the property before the mortgage is left in the proper office for registration, its lien is superior to that of the mortgage.
Hardaway v. Semmes..... 657
5. *When mortgage is purchase for valuable consideration without notice*.
A mortgage, taken to secure the payment of a debt contemporaneously contracted, constitutes the mortgagee a purchaser for valuable consideration, who will be protected in equity against an outstanding vendor's lien of which he had no notice; *secus*, where the mortgage is taken to secure the payment of a pre-existing debt; and where a part of the secured debt is contemporaneously contracted, and the residue is pre-existing, he will be protected only to the extent of the new debt.—*Wells v. Morrow*..... 125
6. *Validity of mortgage*.—The case of *Walthall's Executors v. Rives, Battle & Co.*, (34 Ala. 91,) as to the validity of a mortgage given to

MORTGAGE—CONTINUED.

- indemnify a surety, re-affirmed.—*Rives, Battle & Co. v. Walthall's Executors*..... 329
7. *Assignment and extinguishment of mortgage*.—A creditor may buy in an outstanding mortgage on his debtor's property, take an assignment of it to himself, and have it foreclosed for his benefit; but, if he simply pays the mortgage debt, and takes from the debtor another mortgage on the property, the former mortgage is thereby extinguished; and a court of equity will not establish and enforce it for his benefit, as against purchasers at execution sale against the mortgagor, after the second mortgage has been declared fraudulent and void as to other creditors.—*Wiley, Banks & Co. v. Boyd*..... 625
8. *Reformation of mortgage; notice of mistake*.—To authorize the reformation of a mortgage, as against a purchaser at execution sale against the mortgagor, so as to make it include a slave whose name was omitted by mistake, notice of the mistake before or at the sale is sufficient.—*Williams v. Hatch*..... 338
9. *When mortgagor may come into equity*.—The mortgagor of a slave, who is in possession, and who alleges that the debt has been paid, may nevertheless come into equity to enjoin an action at law for the slave, when it appears that there has been no acceptance of the payment as a satisfaction, and no release of the title by the mortgagee.—*Davis v. Hubbard*..... 185
10. *Rents and profits*.—In taking an account of the mortgage debt, between the mortgagees and an assignee of the equity of redemption, the former are chargeable only with the amount of rents actually received by them, unless they have been guilty of fraud or willful neglect; and where rents are received by one of the mortgagees individually, under a judgment in his favor against the assignee, the amount so received by him must be credited on the mortgage debt, unless it is shown to have been received by him by virtue of a right independent of the mortgage.—*Barron, Meade & Co. v. Paulling*..... 292
11. *Costs at law, and attorney's fees*.—The mortgagees are not chargeable with the amount of costs incurred and paid by the assignee in an unsuccessful attempt to defend the possession at law, or to resist the collection of rents and profits; nor can they charge the assignee with their own attorney's fees.—*S. C.*..... 292
12. *Statutory penalties accountable for as rents and profits*.—The mortgagee having recovered a judgment against the assignee of the equity of redemption, in a statutory action of debt, for cutting timber on the mortgaged lands, the assignee is entitled to have the amount paid by him under the judgment credited on the mortgage debt, and to have the judgment perpetually enjoined on discharging the mortgage debt.—*S. C.*..... 292
13. *Foreclosure of mortgagee under power of sale; waiver of cash payment*.—A provision in a mortgage that the property shall be sold for cash, being intended for the benefit of the mortgagee, may be waived by him; and if he delivers the property to the purchaser at the sale, without requiring payment, he thereby waives the

MORTGAGE—CONTINUED.

- condition, and the sale vests in the purchaser all the title conveyed by the mortgage.—*Williams v. Hatch*..... 338
14. *Rescission of sale by agreement between mortgagee and purchaser.* A rescission of the sale under the power contained in the mortgage, by agreement between the mortgagee and purchaser, does not annul the foreclosure effected by the sale, nor reinvest the mortgagee with his original rights under the mortgage, so as to enable him to maintain a suit in equity for the reformation of the mortgage.—*S. C.*..... 338
15. *Attornment of tenant to mortgagee or purchaser.*—As against all persons except the mortgagee and those claiming under him, the mortgagor is considered the owner of the land, so long as he remains in possession: and if the mortgagee does not disturb the possession of the mortgagor's tenant, nor otherwise assert his rights under the mortgage, an attornment by the tenant to a subsequent purchaser from the mortgagor is valid and effectual as between themselves.—*Knox v. Easton*..... 345
16. *Purchase of outstanding title by mortgagor's vendee.*—If a purchaser from the mortgagor, subsequent to the execution of the mortgage, buys in a paramount title outstanding in a third person, the purchase does not enure to the benefit of the mortgagee, nor operate as a confirmation of his title.—*S. C.*..... 345
17. *Extension of time for payment of mortgage debt.*—Where a mortgagor files a bill to redeem, and is allowed a day for the payment of the money into court, but fails to make the payment within the time prescribed by the decree, without any fraud, accident, or mistake, the chancellor is not bound to extend the day of payment, but may dismiss the bill: nor is there any rule which requires, in such case, that the dismissal shall be without prejudice. *Segrest v. Segrest*..... 674

NUISANCE.

1. *Abatement of.*—A riparian proprietor, upon whose lands the water is thrown back, or its level raised without overflowing the banks of the stream, by a dam erected below him, has a right to abate the nuisance; and the proper mode of abating it is, by lowering the level of the dam, if there be a prescriptive right for it, to the height authorized by such prescription, or, in the absence of any prescription, to such a height as will stop the reflux of the water at his boundary line; but he has no right to divert the water from the stream, to the injury of the proprietor below him, by cutting a ditch on his own land.—*Wright & Rice v. Moore*..... 592
2. *No prescription for.*—There can be no prescription for a public nuisance, and no length of enjoyment can legalize the continuance of a mill-pond which is injurious to the health of the surrounding community.—*S. C.*..... 592

PARTITION.

1. *Jurisdiction of probate court to order sale.*—Where slaves are bequeathed by a testator to his daughter, "for the use of said daughter and her children," the probate court has no jurisdiction

PARTITION—CONTINUED.

under the act approved February 5, 1856, (Session Act, 1855-56, p. 20,) to order a sale of the slaves for partition, on the application of the guardian of the children.—*Wimberly v. Wimberly*..... 40

PARTNERSHIP.

1. *Construction of articles.*—Where the articles of partnership provided, that the active partner should be entitled to one fourth of the net profits, and, if his share of the profits did not amount to \$3,000 at the end of the year, that the other partner should pay him whatever sum might be necessary to make up that amount; that each partner might invest in the partnership, as capital, an amount not exceeding \$10,000, but should not draw out during the year, without the consent of his co-partner, any portion of the capital thus invested; that each might, from time to time, draw out of the moneys of the partnership, for his private use, a specified sum per month; and that the books should be balanced, and a balance-sheet made out, at the end of each year,—*held*, that the resident partner was entitled to receive \$3,000 at the end of each year, although the business of the year resulted in a loss to the firm; and although he allowed his share of the profits, at the end of the first year, to remain to his credit on the books of the firm, it was not thereby invested in the partnership, but remained his property, and might be used or withdrawn by him at any time. *Dumont v. Ruepprecht*..... 175
2. *Dissolution; decreed as of what date.*—A court of equity, in decreeing the dissolution of a partnership, may declare at what date the contract shall be at an end; but it may be questioned, whether a mere violation of the articles of partnership by the defendant, not resulting in loss or injury, would make it proper for the court to fix the date of dissolution at an earlier day than the abandonment of the partnership by the aggrieved party; and where the only effect of a modification of the chancellor's decree, so as to make the dissolution take effect as of an earlier day, would be to deprive the defendant of the right to the compensation stipulated in the articles, and that compensation is shown to be a reasonable allowance for the services actually rendered by him, the appellate court will not disturb the decree.—*S. C.*..... 175
3. *Release of partner, or covenant of creditor not to sue, not available as defense to co-partner.*—An agreement by a creditor to discharge one partner from liability on a partnership debt, (or a covenant not to sue him for twenty years,) on his giving personal security for the payment of a portion of the debt, does not release or discharge the other partners; nor can the latter, when sued by the creditor, claim either a discharge from the debt, or a reduction of it beyond the amount assumed by the surety, by showing that partnership assets beyond that amount, which he had previously delivered up to the discharged partner, to be appropriated to the payment of the partnership debts, were, by the agreement between that partner and the creditor, assigned to the surety for his indemnity, and were afterwards disposed of by him and the surety. *Roberts v. Strang, Adriance & Co.*..... 566

PAYMENT.

1. *Note not extinguishment of debt.*—The giving of a note, without more, is not a satisfaction of the pre-existing indebtedness.—*Fickling v. Brewer*..... 68
2. *Payment to clerk of court.*—A clerk has no authority, before judgment, to receive payment of the plaintiff's debt; yet, if he receives the money from defendant before judgment, retains it in his hands until after judgment, and then manifests, by some plain and unequivocal act, his intention to hold it in his official capacity as clerk, the payment is good, and the judgment thereby discharged.—*Governor v. Read*..... 252
3. *Payment of execution to sheriff after expiration of term of office.*—A sheriff has no authority, after he has gone out of office, to receive payment of an execution which he has returned; yet, if he receives the money, and pays it over to the plaintiff's attorney, by whom it is accepted as a payment, the payment is good, and the execution thereby discharged.—*Dubberly v. Black's Adm'r*..... 193
4. *Of execution.*—A sale of property by the sheriff, under the levy of an execution, is, *pro tanto*, a satisfaction of the execution.—*Rutledge's Adm'r v. Townsend, Crane & Co.*..... 706
5. *Application of money on executions.*—At common law, if several executions or attachments, having equal liens, were levied on the same property, and the proceeds of sale were not sufficient to pay all the debts in full, the funds were divided equally among the several claims, irrespective of their amount; and if the sum thus distributed to any one creditor was more than sufficient to satisfy his debt in full, the surplus was equally apportioned among the other creditors.—*S. C.*..... 706

PHYSICIANS.

1. *Proof of license.*—Under section 975 of the Code, a medical license is competent evidence, without proof of the signatures attached to it.—*White v. Mastin*..... 147
 2. *Contract between physician and patient.*—There is nothing in the ordinary relation between a physician and his patient, which prevents him from discontinuing his services at the instance of the patient, and entering into a contract with another person for the payment of the charges for his future services; nor is the assent of the patient to such new contract necessary.—*S. C.*..... 147
- See, also, CONTRACT, 4, 5, 6, 7.

PLEADING AND PRACTICE.

I. PARTIES.

1. *Who may join as plaintiffs.*—An executor, suing in his representative capacity, and the devisees under the will, cannot join as plaintiffs in a real action in the nature of an ejectment.—*Tarver v. Smith*..... 135

II. COMPLAINT.

2. *Action on contract within statute of frauds.*—In declaring on a contract which is required to be in writing, (Code, § 1551.) it is not necessary to aver that it was in writing.—*Martin v. Whartop*, 637

PLEADING AND PRACTICE—CONTINUED.

3. *Action on irregular endorsement of note.*—In an action by the payee of a note payable in bank, an averment that the defendant endorsed and delivered the note to the plaintiff, that it was protested for non-payment, and that notice thereof was given to the defendant, is sufficient to show a cause of action in favor of the plaintiff against the defendant.—*Price v. Lavender*..... 389
4. *Defamation ; averment of want of probable cause.*—In an action for defamation on account of words used in a judicial proceeding, an averment that the alleged defamatory words were irrelevant, and were used "without justifiable cause or excuse," is not equivalent to an allegation of the want of probable or reasonable cause. *Lawson v. Hicks*..... 279
5. *Forcible entry, and unlawful detainer ; averment of possession.*—An averment that the plaintiff was "lawfully and peaceably possessed of a leasehold interest or estate in the following premises," is not a sufficient averment of actual possession.—*Townsend v. Van Aspen*, 572
6. *Same ; averment of entry and detainer.*—An averment that the defendant "forcibly and unlawfully entered upon said premises, and now, although he has been notified in writing to quit said premises, still forcibly detains the same, and unlawfully refuses to quit," though fuller than necessary, is substantially good.—*S. C.* 572
7. *Same ; description of premises.*—"The following premises, situated in the city of Mobile, and known and described as follows: all that certain piece, parcel, or lot of land, known as No. 268 of the Orange Grove tract, situated on the corner of Jackson and Lipscomb streets, in the city of Mobile,"—is a sufficient description of the premises in controversy.—*S. C.*..... 572
8. *Summary proceeding ; averment of issue of injunction.*—An averment, that the principal obligor in an injunction bond "obtained an injunction" from a circuit judge, involves the assertion that a writ of injunction was issued.—*Dubberly v. Black's Adm'r*..... 193
9. *Same ; averment of plaintiff's appointment and right to sue as administrator.*—*Held*, that the notice in this case showed with sufficient certainty the plaintiff's appointment as administrator, and that the cause of action appertained to him in his representative capacity.—*S. C.*..... 193
10. *Trespass for false imprisonment.*—A count which avers that the defendant, "maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned on a charge of perjury," is in trespass; and so is a count which avers that the defendant "falsely imprisoned plaintiff, and detained him in prison and custody, without any reasonable or probable cause therefor, contrary to law, and against his will."—*Woodall v. McMillan*. 622

III. PLEAS.

11. *In abatement ; pendency of another action.*—The priority, and not the mere pendency, of another suit founded on the same cause of action, is available under a plea in abatement; but neither a bill in chancery, nor an action brought in another State, is good matter in abatement.—*Humphries v. Dawson* 199

PLEADING AND PRACTICE—CONTINUED.

12. *Set-off*.—A plea by the lessee, in an action to recover the rent reserved by the lease, averring that the lessor, pending the negotiations between the parties, misrepresented in a specified particular the capacity of a mill on the leased premises; that the lessee believed the representations to be true, and was thereby induced to consummate the contract; and that, by reason of such misrepresentations, he has sustained great damage, "wherefore he says that said contract is utterly void by reason of said deceit and misrepresentations,"—is a good plea of set-off.—*Cage & Salter v. Phillips* 382
13. *When sworn plea is necessary*.—In an action by the payee, against an irregular endorser of a note payable in bank, the plaintiff is not required to prove either the endorsement or his ownership of the note, unless they are denied by plea verified by affidavit. *Price v. Lavender*..... 389
14. *General issue, in libel or slander*.—Where the alleged defamatory words were contained in cross-interrogatories propounded to a witness in a former suit between the parties, it is a good defense under the general issue, that the defendant propounded the interrogatories for the purpose of laying a predicate to impeach the witness, and honestly believed that he had the right so to do.—*Lawson v. Hicks*..... 279
15. *Error without injury in sustaining demurrer to special plea*.—The sustaining of a demurrer to a good special plea, when the defendant had the benefit of the same defense under the general issue, is error without injury.—*S. C.*..... 279
16. *Presumption in favor of judgment*.—When a plea, which was struck out on motion in the primary court, is no where set out in the record, the appellate court will presume that it was of such character as justified that action.—*Cotten v. Bradley*..... 506

IV. GENERAL PRACTICE.

17. *Acknowledgment of service of complaint, and waiver of summons*.—Where the defendant acknowledges service of the complaint, and waives a summons, the cause stands in court, on the filing of the complaint, as if a summons had been issued on the day such acknowledgment and waiver were made.—*Tuskaloosa Wharf Co. v. Mayor &c. of Tuskaloosa*..... 514

PRESCRIPTION.

See ADVERSE POSSESSION, 6, 7, 8.

PROHIBITION.

1. *Lies when*.—Where a probate judge has granted the writ of *habeas corpus* to an enrolled conscript, whose petition for the writ shows on its face that said judge has no jurisdiction to inquire into the validity of his enrollment, a prohibition will be awarded by the supreme court, without a previous application to the circuit court, enjoining further proceedings by the probate judge; and the application for the writ may be made by the enrolling officer who has the custody of the conscript.—*Ex parte Hill in re Willis*..... 429

RAILROADS.

See CORPORATIONS, 3.

REAL ACTION.

See EJECTMENT.

REHEARING AT LAW.

1. *What constitutes accident or surprise.*—A defendant in a judgment at law can not obtain a rehearing under the statute, (Code, § 2408,) on the ground that he had forgotten at the trial, that he had previously made a tender, which was refused, and which was less than the amount of the verdict in favor of the plaintiff; nor because an important witness, who was not subpoenaed, "moved and travelled about a great deal, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony."—*Allington v. Tucker*..... 655

REMAINDER.

1. *By oral gift.*—In this State, a remainder in personal property can not be created by parol gift.—*Ragsdale v. Norwood*..... 21
2. *Action between tenants in common of remainder in slaves.*—If one tenant in common of a remainder in slaves, during the existence of the particular estate, obtains possession of the slaves, and sells and conveys them as his absolute property, his co-tenant may maintain a special action on the case against him.—*Arthur v. Gayle*..... 259
3. *Action by remainder-man against stranger.*—A sale of the absolute interest in slaves by a stranger, during the existence of the particular estate, is an injury for which an action lies in favor of the remainder-man.—*S. C.*..... 259

SET-OFF.

1. *Unliquidated damages.*—Under section 2240 of the Code, damages on account of the lessor's misrepresentation as to the capacity and condition of a mill on the leased premises, are available as a set-off in an action of covenant to recover the rent reserved.—*Cage & Salter v. Phillips*..... 382
2. *Same.*—Under section 2240, a cross-demand, growing out of a defect in the vendor's title, is available as a set-off in an action on the notes for the purchase-money, although the purchaser is in possession of the lands; but, before the Code was adopted, the law was otherwise.—*Martin v. Wharton*..... 637
3. *Same; inchoate right of dower not available as set-off.*—An inchoate right of dower cannot be measured accurately by any pecuniary standard; consequently, damages for the breach of a promise to procure a relinquishment of such right, or to indemnify against it by bond with surety, is not available as a set-off to the purchaser, (Code, § 2240,) in an action on the notes given for the purchase-money of the lands.—*S. C.*..... 637
4. *Plea.*—A plea by the lessee, in an action to recover the rent reserved by the lease, averring that the lessor, pending the negotiations between the parties, misrepresented in a specified particu-

SET-OFF—CONTINUED.

lar the capacity of a mill on the leased premises; that the lessee believed the representations to be true; and was thereby induced to consummate the contract; and that, by reason of such misrepresentations, he has sustained great damage, "wherefore he says that said contract is utterly void by reason of said deceit and misrepresentations,"—is a good plea of set-off.—*Cage & Salter v. Phillips*..... 382

SHERIFF.

1. *Payment of execution to, after expiration of term of office.*—A sheriff has no authority, after he has gone out of office, to receive payment of an execution which he has returned; yet, if he receives the money, and pays it over to the plaintiff's attorney, by whom it is accepted as a payment, the payment is good, and the execution thereby discharged.—*Dubberly v. Black's Adm'r*..... 193
2. *Motion against, for failing to make money on fi. fa.*—A failure to make the money on a *fi. fa.*, when by due diligence it might be made, is "a failure to execute process," (Code, § 2600,) for which the sheriff may be ruled, either in the circuit court of his county, or in the court to which the process was returnable.—*Andrews v. Keep*.... 315
3. *Same; waiver of jury trial.*—In a summary proceeding against a sheriff, for failing to make the money on a *fi. fa.*, if the defendant makes default, it is the duty of the court to render judgment on the evidence, (Code, § 2599,) within the intervention of a jury. *S. C.*..... 315

SLANDER.

See LIBEL AND SLANDER.

STEAMBOATS.

1. *Registration of ownership.*—In an action against the owners of a steamboat, as registered under the act of February 15, 1854, (Session Acts, 1853-4, p. 50,) the defendants cannot exonerate themselves from liability by showing a change of ownership, unless such change of ownership has also been recorded as required by that statute.—*Bell v. Chambers*..... 660
2. *Statutory lien.*—The statute giving a lien on steamboats and other vessels, for work done or materials supplied, and for the wages of the officers, laborers, and crew, (Code, § 2692,) makes no distinction between the two classes of creditors.—*McClure v. Steamboat James Dellett*..... 336
3. *Waiver of statutory penalty for landing goods at improper place.*—If goods shipped by steamboat, on an inland river, are delivered to the consignee or owner, and with his consent, at a point less than ten feet perpendicular above the surface of the water at the specified landing, the owner cannot afterwards maintain an action to recover the statutory penalty, (Code, §§ 896-7) on account of such delivery.—*Winston v. Cox, Brainard & Co.*..... 268
4. *Statutory liability for loss of slave transported without master's written authority.*—It is a complete defense to a statutory action against the owners of a steamboat, for the loss of a slave who was transported on their boat without the written authority of

STEAMBOATS—CONTINUED.

- the master, (Code, § 1010,) that the slave "was a white man in all and every appearance, and would be so received and treated wherever he might go, without suspicion, where he was unknown, and that the defendants and their agents had no knowledge or suspicion of his being a slave."—*Bell v. Chambers*..... 660
5. *Same*; counsel fees recoverable as part of damages.—In such action, the plaintiff's counsel fees are recoverable as a part of the "reasonable expenses attending the prosecution of the suit."
S. C...... 660

SUMMARY PROCEEDINGS.

1. *Against sheriff, for failure to make money on fi. fa.*—A failure to make the money on a *fi. fa.*, when by due diligence it might be made, is a "failure to execute process," (Code, § 2600,) for which the sheriff may be ruled, either in the circuit court of his county, or in the court to which the process was returnable.
Andrews v. Keep..... 315
2. *Same*; waiver of jury trial.—If the defendant makes default, it is the duty of the court to render judgment on the evidence, (Code, § 2599,) without the intervention of a jury.—*S. C.*..... 315
3. *By surety against principal; when maintainable, and where instituted.*—A surety on an injunction bond, having paid the judgment against his principal and himself, which resulted by operation of law from the dissolution of the injunction, may maintain a summary proceeding against his principal, under section 2641 of the Code; and, under section 2650, the motion may be made in the county of the defendant's residence.—*Dubberly v. Black's Adm'r*..... 193
4. *Same*; sufficiency of notice, in averring plaintiff's appointment and right to sue as administrator.—*Held*, that the notice in this case showed with sufficient certainty the plaintiff's appointment as administrator, and that the cause of action appertained to him in his representative capacity.—*S. C.*..... 193
5. *Statutory judgment on injunction bond.*—On the dismissal of a bill in chancery, and the consequent dissolution of the injunction, under the law which was of force in 1845, a statutory judgment resulted against the obligors on the injunction bond, notwithstanding the failure of the register to certify the dissolution of the injunction to the clerk of the court in which the judgment at law was rendered.—*S. C.*..... 193

SUPREME COURT.

1. *Jurisdiction of special.*—When two of the judges of the supreme court are incompetent to sit in a cause, and the remaining judge, being of opinion that the judgment of the court below ought to be reversed, certifies the facts to the governor for the appointment of a special court, (Code, § 573,) and then goes out of office, before the cause is decided by the special court,—the authority of such special court is at an end; and if the succeeding judge is competent to sit in the cause, it must be heard before him; and if he is of opinion that the judgment should be

SUPREME COURT—CONTINUED.

affirmed, his judgment is of the same force and effect as if it were the judgment of a majority of the supreme court.—*Goodman & Mitchell v. Walker*..... 142

SURETIES.

See SUMMARY PROCEEDINGS, 3.

TAX.

1. *Auction sales*.—The tax imposed by law on the gross amount of auction sales, (Code, § 391, subd. 17,) is to be assessed against and paid by the auctioneer, and not by the owner of the property sold.—*The State v. Lee & Norton*..... 222
2. *Statutory power of corporation to levy special tax*.—A grant of power to a corporation to levy a special tax must be strictly construed, and any doubtful question as to the extent of the power must be decided against the corporation.—*Lott v. Ross & Co.*.... 156
3. *Construction of statute authorizing special tax for improvement of bay and harbor of Mobile*.—The 5th section of the act approved February 21, 1860, entitled "An act for the improvement of the bay and harbor of Mobile," (Session Acts 1859, p. 538,) which authorizes the assessment and collection of a special tax, "not exceeding twenty cents upon each hundred dollars of taxable property within said county," does not authorize the imposition of a tax on the gross amount of sales of merchandize.—*S. C.*.... 156
4. *Construction of act of February 24, 1860, authorizing city of Montgomery to aid South and North Alabama railroad*.—The act "to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad," approved February 24, 1860, which authorizes the corporate authorities of said city, "in such manner as they may deem expedient, to take the sense of the holders of real estate in said city, upon the proposition to raise by tax upon real estate" a special sum, to be invested in stock of said railroad company, requires that the sense of all the holders of real estate in the city shall be ascertained by an expression of their wishes *per capita*, before the proposed tax can be levied: an election, held under an ordinance of the corporate authorities, by which it is provided that the vote shall be taken *pro rata* according to the value of the real estate owned by the respective voters, "each voter being allowed one vote for every hundred dollars of assessed real estate owned by him," is not a compliance with the terms of the act; and although it appears, from the register kept by the managers of the election, that, of all the persons who voted at such election, a majority in number voted for the tax, this does not cure the defect in holding the election on illegal principles, which may have prevented persons from voting.—*City Council of Montgomery v. The State ex rel. &c.*..... 162

TRESPASS.

1. *For false imprisonment; complaint*.—A count which avers that the defendant, "maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned on a charge of

TRESPASS—CONTINUED.

- perjury," is in trespass; and so is a count which avers that the defendant "falsely imprisoned plaintiff, and detained him in prison and custody, without any reasonable or probable cause therefor, contrary to law, and against his will."—*Woodall v. McMillan* 622
2. *Same; evidence in mitigation.*—In such action, the void warrant of arrest, and proceedings had under it, are admissible evidence in mitigation of vindictive damages.—*S. C.* 622

TRUSTS.

1. *Liability of trustee as garnishee.*—Where the answer of a garnishee states, that he is the trustee in a deed of trust executed by the defendant,—the validity of which is not assailed for fraud, and which provides for the conversion of the assets into money, the payment of certain preferred creditors, and the distribution of the residue among all the other creditors equally; that he has paid the preferred debts, and that the balance remaining in his hands is not sufficient to satisfy in full the unpreferred debts,—no judgment can be rendered against him on the answer, although he does not specify the names of any of the unpaid creditors.—*Lightfoot v. Rupert & McClelland* 666
2. *Succession to trust estate on death of trustee.*—By a statute in this State, (Code, § 1323,) on the death of the sole trustee of an express trust, the trust estate does not pass to his heirs or personal representatives; but the rule at common law was different, and that rule will be presumed, in the absence of evidence to the contrary, to prevail in a sister State; yet a personal representative, appointed in another State, would have no right, by virtue of that appointment, to maintain a suit here to enforce payment of a debt due to the trust estate out of the debtor's assets.—*McDougald's Adm'r v. Carey* 320
3. *Same.*—The statute of Georgia, approved December 16, 1861, entitled "An act to provide for the appointment of new assignees and trustees in certain cases," as proved in this case, changes the common-law rule in reference to the succession to a trust estate on the death of the sole or surviving trustee under an assignment for the benefit of creditors, and authorizes the appointment of a new trustee, on the petition of two or more of the creditors, by the superior court of the county.—*S. C.* 534
4. *Construction of deed, as to respective rights of trustee and beneficiaries.*—Where a female slave is conveyed by deed to a trustee, "in trust that he shall take and receive all the profits and income arising from the said slave and her increase, and apply the same to the education and maintenance of L. and H.," his two daughters, "and in trust, upon the marriage or coming of age of the said L. and H., to permit them to have the full use, authority and command over the said slave and her increase, (a division or partition having been made,) for and during the natural lives of the said L. and H.; and after their death, in trust further to convey the respective portions of the property to their children, in fee-simple forever,"—if the slaves are divided between the two

TRUSTS—CONTINUED.

daughters, on their marriage or coming of age, and the respective portion of each delivered to her by the trustee, he cannot afterwards, during the lives of the daughters, maintain detinue against them, or any one holding under them, to recover the slaves; and if, without making a division, he delivers all the slaves to one of the daughters, on her marriage, and afterwards conveys other property to the other daughter in lieu of her interest in the slaves, he cannot maintain detinue for the slaves, against a purchaser from the daughter to whom they were delivered.—*Humphries v. Dawson*..... 199

USURY.

See CHANCERY, 16.

VENDOR AND PURCHASER.

- 1 *What constitutes fraud by vendor.*—To constitute a fraud on the part of the vendor, in misrepresenting the location of the boundary lines of the land and the capacity and quality of mills situate on the lands, it is not necessary that the representations should be known by him to be false, nor that they should be made under circumstances manifesting a recklessness of truth on his part. *Foster v. Kennedy's Adm'r* 359
2. *Same.*—A representation by the vendor, as to the location of the boundary lines of the land, or as to the capacity and qualities of a mill situated thereon, cannot be declared, as matter of law, the statement of an opinion; but it is a question for the jury to decide, whether it is the statement of an opinion or a fact.—*S. C.*..... 359
3. *Same.*—A statement by the vendor, made pending the negotiations between him and the purchaser, to the effect that his wife, if she survived him, would only be entitled to dower in the lands of which he died seized and possessed, and not in lands sold and conveyed by him during the coverture, is a misrepresentation as to a matter of law, and does not constitute a fraud.—*Martin v. Wharton*..... 637
4. *Set-off for damages available at law, in action for purchase-money.* Under section 2240 of the Code, a cross demand, growing out of a defect in the vendor's title, is available as a set-off in an action on the notes for the purchase-money, although the purchaser is in possession of the lands; but, before the Code was adopted, the law was otherwise.—*S. C.*..... 637
5. *Inchoate right of dower not available as set-off.*—An inchoate right of dower cannot be measured accurately by any pecuniary standard; consequently, damages for the breach of a promise to procure a relinquishment of such right, or to indemnify against it by bond with surety, is not available as a set-off to the purchaser, (Code, § 2240,) in an action on the notes given for the purchase-money of the lands.—*S. C.*..... 637
6. *Measure of damages for misrepresentation; variance.*—In an action by the purchaser, to recover damages for a misrepresentation of the boundary lines by the vendor, in falsely stating that a mill and mill-pond were included in the tract, the measure of the damages

VENDOR AND PURCHASER—CONTINUED.

- which the plaintiff is entitled to recover, is the difference between the actual value on the land and its value on the supposition that the representation was true; but he cannot be allowed to prove what would have been the value of the land if the pond had been on a part of the tract different from that on which, according to the averments of the complaint, it was represented to be.—*Foster v. Kennedy's Adm'r*..... 359
7. *Assignment of notes for purchase-money*.—An assignment of notes, given for the purchase-money of land, carries with it the vendor's lien on the land for their payment; and the assignee may enforce the lien in equity in his own name.—*Wells v. Morrow*..... 125
8. *Legal title to slave passes to whom*.—Where a mother purchases a slave for her infant daughter, with money furnished for that purpose by the child's grandfather, but accepts a bill of sale to herself, the legal title vests in her, and not in her daughter; and the fact that she objected to the bill of sale at the time, because it did not convey the title to her daughter instead of herself, and that the vendor then promised to execute another bill of sale at some future time, does not vary the case.—*Haden and Wife v. Tucker*... 399

WILL.

1. *Parties to proceeding for probate*.—Although the statute requires that the widow and next of kin shall be notified of a proceeding before the probate court for the probate of a will, yet they are not parties to the proceedings, unless they appear and participate therein... *Clemens v. Patterson* 721
2. *Proof of execution*.—Although two subscribing witnesses are necessary to the execution of a will, their testimony is not the only evidence by which the execution of the will can be established, on the contrary, any defect in their testimony may be supplied by that of the person who wrote the will, and who was present when it was signed and attested, or by other evidence *aliunde*.—*Hall's Heirs v. Hall's Executors*..... 131
3. *Probate of will containing invalid bequest*.—The invalidity of a particular provision or bequest in a will, which also contains valid bequests, is no objection to the probate of the will.—*S. C.*..... 131
4. *What is insane delusion*.—To establish an insane delusion on the part of the testator, such as will invalidate his will, something more must be shown than a mistaken notion on his part as to the feelings, or intentions of his relatives towards him or his property.—*S. C.*..... 131
5. *What is undue influence*.—To set aside a will on the ground of undue influence, it must be shown that the influence exerted on the mind of the testator was equivalent to moral coercion, and constrained him, through fear, the desire of peace, or some other feeling than affection, to do that which was against his will.—*S. C.*... 131
6. *Relevancy of evidence to show incapacity of testator, fraud, or undue influence*.—Where the probate of will is contested, on the grounds of fraud, undue influence, and moral incapacity on the part of the testator, it is permissible to inquire whether the provisions of the will are just and reasonable, and consonant with the state of the

WILL—CONTINUED.

- testator's family relations; and proof of the value of his estate, and the pecuniary circumstances of those relatives who, in case of intestacy, would be his heirs-at-law and distributees, is admissible evidence as bearing on this question.—*Fountain v. Brown*.... 72
7. *Same*.—In such case, it is competent for the contestant to prove that the testator was "diseased" before the execution of the supposed will.—*S. C.*..... 72
8. *Relevancy of evidence to show incapacity of testator*.—The fact that the testator had conveyed to third persons, before the execution of the supposed will, some of the property disposed of by it, is competent evidence for the contestants, as tending to show the failure of his memory.—*S. C.*..... 72
9. *Widow's dissent*.—Where a widow executes in writing her dissent from her husband's will, and hands it to a friend, with instructions to file it in the office of the probate judge, and then dies; if the dissent is filed by the person to whom it was entrusted, after her death, but within the period prescribed by the statute, (Code, § 1610,) this is a sufficient compliance with the requisitions of the statute.—*McGrath v. McGrath's Adm'r*..... 246
10. *Emancipation act of 1860 not retroactive*.—The act of January 25, 1860, "to amend the law in relation to the emancipation of slaves," (Session Acts 1859-60, p. 28) does not affect wills which had been admitted to probate before its passage.—*Hall's Heirs v. Hall's Executors*..... 131
11. *Power and duty of executor, under will, in supporting and educating minor children*.—Where the testator directed his estate to be kept together, and his slaves be hired out by his executor, until his youngest child attained full age or married, when the slaves were to be sold for general distribution among all his children; bequeathed to each child a pecuniary legacy, to be paid as they severally arrived at full age or married; set apart the hire of the slaves, with the proceeds of the sale of certain real estate directed to be sold, as a fund for the payment of the legacies: and added, "It is my wish, that my minor children be educated and supported out of the same fund that their legacies are to be raised out of,"—held, that the executor, although he was not appointed guardian of the minor children, was authorized to disburse from the proper fund whatever might be necessary for their support and education. *Smith v. Kennard's Executors*..... 695
12. *Will authorizing estate to be kept together, and family to be supported jointly out of income*.—A will containing the following provisions—"I wish my just debts first satisfied and paid, and the balance of my estate to be kept together till my oldest child becomes of age or marries; then, I wish that child to draw an equal part of my estate, except the land; the balance of the children to be dealt with as the oldest or first—to remain together with their mother, until such time as they may attain age or marry; at which time, I wish each to draw his or her equal part of my estate, except the land. When my youngest child becomes of age, or marries, I wish my wife to take her dower in my lands, and a

WILL—CONTINUED.

child's part of my other property; and the balance of the land I wish sold, and the moneys arising from such sale to be equally divided among my children. I wish my children to receive a good English education, and my sons to be raised to business"—authorizes the family to be kept together and supported jointly out of the income of the estate; consequently, the special expenses incurred by one of the children, prior to her marriage or attainment of majority, are not a proper charge against her separate distributive share of the estate.—*Clopton and Wife v. Jones' Executor*..... 121

See, also, LEGACY AND DEVISE.

WITNESS.

1. *Competency as affected by interest*.—Where separate actions of trover are instituted by the owner, against the hirer and sub-hirer of a slave, for a conversion arising from the unauthorized sub-hiring, the sub-hirer is a competent witness for the plaintiff, (Code, § 2302,) since a judgment against him would not be evidence for or against the latter, except in the sense in which it would be evidence against all the world.—*Gimon v. Baldwin*..... 60
2. *Same*.—Where an execution against a partnership is levied on a slave, and a purchaser from one of the partners brings detinue to recover the slave, the other partner is a competent witness for the defendant, (Code, § 2302,) since a judgment against him would not be competent evidence against the witness in a subsequent suit.—*Coltart v. Laughinghouse*..... 190
3. *Same*.—The vendor of a slave is a competent witness for the purchaser, in a suit involving the title, where it appears that his interest is equally balanced: section 2302 of the Code does not apply to such a case.—*Garner v. Bridges*..... 276
4. *Competency of donor, as witness for donee*.—The donor of a slave is a competent witness for the donee, or one claiming under the donee, in a suit involving the title to the slave.—*Humphries v. Dawson*..... 199
5. *Competency of legatee as witness for will*.—In a chancery suit to set aside the probate of a will, a legatee, to whom a pecuniary legacy is bequeathed, and who has received his legacy from the executors, may be rendered a competent witness to sustain the will, by the defendants' repaying to the executors the amount of the legacy, with interest, in discharge of any claim they might have on the legatee, and releasing the legatee, the executors, and the estate, from all liability to repay or account for the money; the legatee at the same time approving and adopting the payment, and releasing the executors from all claim on account of the legacy; and the executors accepting the payment, and releasing the legatee from all liability on account of the money paid to him.—*Hall's Heirs v. Hall's Executors*..... 131
6. *Cross-examination of witness*.—In cross-examining a witness for the purpose of testing his credibility, it is permissible to investigate his situation in reference to the subject-matter of the suit, his relations towards the parties, his interests, prejudices, and mo-

WITNESS—CONTINUED.

- tives; and where it appears that his testimony tended to relieve himself of the imputation of negligence in connection with the subject-matter of the suit, and conflicted with the testimony of other witnesses, the appellate court will not reverse on account of the latitude allowed in the cross-examination, unless the record plainly shows that an improper indulgence was permitted.—*Winston v. Cox, Brainard & Co.*..... 268
7. *Opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.—*Cheek v. The State*..... 227
8. *Same.*—In an action to recover stipulated wages as an overseer, the question being whether plaintiff performed his duty as an overseer, a witness who frequently saw the defendant's plantation while the plaintiff was in charge of it, and who is shown to have been an overseer for five or six years, may state that, in his opinion, plaintiff "managed pretty well."—*Spiva v. Stapleton*..... 171
9. *Opinion of witness on question of sanity.*—A witness who was long and intimately acquainted with the testator, may state his opinion on the question of sanity or insanity, in connection with the facts on which it is based.—*Fountain v. Brown*..... 72
10. *To what witness may testify.*—A witness cannot testify that a person "was deranged or iusane"; nor that "her insanity became worse because of the conduct" of her husband and another woman; nor that a man and a woman "lived in adultery" with each other: such statements are mere conclusions, or deductions from facts, and not the facts themselves.—*Gregory v. Walker*.... 26
11. *Same.*—A witness cannot be allowed to testify that a person "was insolvent," although he states that he "knows the fact of his own personal knowledge".—*Nuckolls v. Pinkston*..... 615
12. *Same.*—A witness may testify, that a seizure of property by an officer, without lawful authority, "was made in an offensive and insulting manner."—*Raisler v. Springer*..... 703
13. *Same.*—A witness may testify, although he is not an expert, that a person was "diseased."—*Fountain v. Brown*..... 72

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